Robert J. McKennon (SBN 123176) *rm@mckennonlawgroup.com*
Joseph S. McMillen (SBN 174561) *jm@mckennonlawgroup.com*
McKENNON LAW GROUP PC
20321 SW Birch Street, Suite 200
Newport Beach, California 92660
Phone: 949-387-9595 | Fax: 949-385-5165

Attorneys for Plaintiff Dora Martinez

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - WESTERN DIVISION

DORA MARTINEZ,

Plaintiff,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA; and DOES 1 to 10, inclusive

Defendants.

Case No.:

Action Filed:

Trial Date:

COMPLAINT FOR RECOVERY OF ERISA PLAN BENEFITS; ENFORCEMENT AND CLARIFICATION OF RIGHTS; PRE-JUDGMENT INTEREST AND ATTORNEYS' FEES

[Filed Concurrently With:
- Civil Cover Sheet;
- Summons; and
- Certification of Interested Parties]

NATURE OF ACTION

1. In this lawsuit, Plaintiff Dora Martinez seeks to recover disability benefits from Defendant, The Prudential Insurance Company of America ("Prudential") because she suffers from debilitating depression, anxiety, panic attacks, right-sided shoulder, foot and knee pain culminating in meniscus surgery and low back pain, and can no longer perform her job duties as a Business Relationship Manager for a large national bank. Prudential issued a group long-term disability insurance policy to the bank for the benefit of its employees, including Ms. Martinez. She was enrolled for the disability coverage when she became disabled. But Prudential improperly denied her claim despite an overwhelming record of evidence that her disability prevents her from performing the material duties of her regular occupation. Prudential improperly failed to pay Ms. Martinez the disability benefits due her under the policy in her time of need, and she is also entitled to interest and her attorneys' fees.

2. The group disability policy and this action is governed by the Employee Retirement Income Security Act of 1974 ("ERISA").

THE PARTIES

3. Plaintiff is an individual who, at all times relevant to this action, was a citizen and resident of the state of California residing in La Mirada, California, in Los Angeles County. At all times relevant to this action, Plaintiff was a participant, as defined by ERISA section 3(7), 29 U.S.C. section 1002(7), in the employee welfare benefit plan established by her former employer JP Morgan Chase Bank, N.A. ("Chase Bank"), which is at issue in this action.

4. Defendant Prudential is, and at all relevant times was, on information and belief, a New Jersey corporation with its principal place of business located in Newark, New Jersey. Defendant Prudential at all relevant times administered long-term disability ("LTD") benefits provided to Chase Bank employees, including Plaintiff, by issuing group policy/contract number G-50684-DE ("group policy" or "Policy") to Chase Bank (the group policyholder) for the benefit of its employees. The group policy Prudential issued is and was the funding source of the LTD benefits for Chase Bank's employee welfare benefit plan. The Chase Bank employee welfare benefit plan, including Prudential's group policy, the certificate of insurance and all other plan contract documents, are hereafter referred to collectively as "the Plan." The Plan, including the group policy, promised to pay LTD benefits to Plaintiff should she become disabled. Defendant Prudential has acted as a claims administrator and as an ERISA claims fiduciary of the Plan for LTD benefits and the group policy.

5. The true names and capacities, whether individual, corporate, associate or otherwise of the defendants named herein as DOES 1 through 10, inclusive, are unknown to Plaintiff at this time, who therefore sue DOES 1 through 10 by fictitious names and will ask leave of the Court to amend this Complaint to show the true names and capacities of DOES 1 through 10 when the same are ascertained; DOES 1 through 10 are sued as principals and/or agents, servants, attorneys, and employees of said principals, and all the acts performed by them were within the course and scope of their authority and employment. Plaintiff is informed and believes and thereupon alleges that each of DOES 1 through 10 is legally responsible in some manner for the events referred to herein, and directly and proximately caused the damages and injuries to Plaintiff as hereinafter alleged.

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JURISDICTION AND VENUE

6. Plaintiff brings this action to recover disability insurance benefits and to enforce and clarify her rights under section 502(a)(1)(B) of ERISA, 29 U.S.C. section 1132(a)(1)(B). This Court has subject matter jurisdiction over Plaintiff's claim pursuant to ERISA section 502(e) and (f), 29 U.S.C. section 1132(e) and (f), and 28 U.S.C. section 1331.

7. Venue lies in the Central District of California, Western Division pursuant to ERISA section 502(e)(2), 29 U.S.C. section 1132(e)(2), because Plaintiff resides in this district, some of the breaches alleged occurred in this district and the ERISA-governed plan at issue was administered in part in this district. Venue is also proper pursuant to 28 U.S.C. section 1391(b) because a substantial part of the events or omissions giving rise to Plaintiff's claim occurred within this district. Namely, Defendant denied Plaintiff's claim in La Mirada, County of Los Angeles, California within this district.

FACTUAL BACKGROUND

8. Ms. Martinez began working for Chase Bank on July 1, 2008 as a Business Relationship Manager. She held that position at the time she became disabled on September 10, 2014. Ms. Martinez's job was akin to a field sales executive responsible to promote the bank's products and services to prospective and existing high-end business clients with $500,000 to $20 million in revenues, primarily in the manufacturing and distributing industries. She had to understand complex business, banking, finance, credit and risk management concepts, as well as intimately understand the bank's products and each business she served, to tailor the bank's financial products to best meet a business' particular needs without

placing the bank at unnecessary risk. She also had to "pitch" the bank's products and services to business owners and persuade them to use Chase Bank.

9. Her position was not sedentary but required extensive travel, walking and standing for most of the day while mentally concentrating at a high level to sell Chase Bank's financial products and services to these businesses, learn about and understand the business, its financial needs and risk to the bank. Ms. Martinez had approximately 190 existing and prospective customers in her portfolio with whom she was required to build strong economic and personal relationships. Because her clientele is mostly manufacturing and distributing companies with large warehouse facilities, she had to walk extensively while touring the warehouses. She usually met with four businesses per day to either try to acquire the account for Chase Bank, if not a current customer, or deepen an existing relationship. This required her to build deep, lasting relationships with customers/clients and key employees.

10. Before going on her field sales meetings for the day, Ms. Martinez would first meet with other bank employees in the morning at the Chase Bank branch office in La Mirada or Whittier. During these team meetings, she discussed strategy and learned of potential leads on business clients. Ms. Martinez, after the team meetings, called clients and potential clients to introduce herself and schedule sales meetings.

11. The book of business Ms. Martinez serviced was in downtown Los Angeles, other parts of Los Angeles County, Orange County, Riverside County and Ventura County. This required her to drive daily from the Chase La Mirada/ Whittier branches to these customer locations. She had to sit still in her car sometimes for hours at a time in traffic. Other times, the driving part of the trip was fairly short, but she consistently was on her feet standing and walking for long

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periods of time while at the clients' warehouses. Her job required working approximately forty to sixty hours per week, being on her feet, walking and standing, around 85% of her workday. Her job was high stress as she was scrutinized daily to meet monthly sales/performance numbers.

12. Ms. Martinez is entitled to LTD benefits because she met, and continues to meet, the Plan's operative definition of "disability" and the other conditions necessary to qualify for LTD benefits during the requisite time-period.[1] The Plan and, specifically, Prudential's group policy states that:

> You are considered disabled when Prudential determines that:
>
> - you are unable to perform the ***material and substantial duties*** of your ***regular occupation*** due to your ***sickness*** or ***injury***; and
> - you are under the ***regular care*** of a ***doctor***; and
> - you have 20% or more loss in your ***monthly earnings*** due to sickness or injury. (Emphasis in original indicating defined terms).[2]

13. The Policy provides that "Prudential will assess your ability to work and the extent to which you are able to work by considering the facts and opinions from: your doctors; and doctors, other medical practitioners or vocational experts of our choice." And, it provides that Prudential "may require you to be examined by doctors, other medical practitioners or vocational experts of our choice . . . as often as it is reasonable to do so."

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[1] The claim file indicates Ms. Martinez's coverage under the Plan and group policy for LTD benefits became effective on July 1, 2009 and that she was covered at the time of her reported disability. Therefore, as Prudential concedes, Ms. Martinez was covered by the policy in September 2014 when she became disabled.

[2] After 24 months of payments, the policy converts to an "any gainful occupation" standard for disability. That definition is irrelevant to this lawsuit since Ms. Martinez became disabled in September 2014 and the policy has a 182-day elimination period before payments should have commenced.

14. The Policy includes the following pertinent definitions:

> ***Regular occupation*** means the occupation you are routinely performing when your disability begins. Prudential will look at your occupation as it is normally performed instead of how the work tasks are performed for a specific employer or at a specific location.
>
> ***Material and substantial duties*** means duties that are normally required for the performance of your regular occupation; and cannot be reasonably omitted or modified.
>
> ***Sickness*** means any disorder of your body or mind, but not an injury; pregnancy including abortion, miscarriage or childbirth. Disability must begin while you are covered under the plan. (Emphasis in original indicating defined terms).

15. Under the terms of the Plan, Plaintiff is entitled to 60% of her monthly pre-disability earnings. Based on her pre-disability earnings, Plaintiff is entitled to approximately $4,548 per month before adjustments from other income reductions, if any. Benefits are payable after the employee has been disabled for 182 days, *i.e.* the Plan's "Elimination Period," in Ms. Martinez's case, disability commencing September 10, 2014. Thus, benefits should have commenced in March 2015 but were never paid by Prudential.

16. On September 10, 2014, Ms. Martinez was forced to stop working at Chase Bank due to mental illness. She was actively at work and eligible for disability benefits under the Plan on her last day of work, September 9, 2014, before her date of disability. But as of September 10, 2014, her mental illness (and later physical injuries) rendered her totally disabled. She has not worked since for Chase Bank or anyone else.

17. Ms. Martinez has experienced severe and continuous symptoms of mental illness including depression, anxiety, panic attacks and insomnia since September 2014. These symptoms prevent her from the high-level of mental

concentration and acuity needed to perform her material job duties of soliciting clients, maintaining and deepening existing client relationships, and presenting them with complex business, finance and risk management concepts to sell Chase Bank's financial products and services (and from analyzing them and evaluating the risk to the bank and client before making her "sales pitch"). Ms. Martinez is unable to focus sufficiently, follow-through with tasks or maintain a reasonably stable emotional level to consistently relate with clients and deepen relationships with them throughout the day, each of which is required by her occupation.

18. Ms. Martinez has also experienced significant pain in her right knee and shoulder since February 2015 and, thereafter, low back pain and pain in her right foot. She had a torn meniscus in her knee since then that culminated in surgery under general anesthesia in April 2016. These physical symptoms have prevented her from performing the long hours of daily walking, standing and driving required by her job (in order to promote the bank to prospective and existing clients).

19. To date, Ms. Martinez's problems have not resolved. The medical and other evidence in Prudential's claim file unequivocally establishes Ms. Martinez's continuous disability from performing the duties of her regular occupation within the meaning of the Policy from September 2014 to present, contrary to what Prudential concluded.

20. After the onset of her disabling depression and anxiety, Ms. Martinez took a leave of absence from work, then applied for, and received, short-term disability benefits ("STD") from Chase Bank for the maximum duration. The medical records continued to support her claim for disability benefits, as Chase Bank determined by paying her claim.

21. For example, on September 9, 2014, Renuka Patel, M.D., Ms. Martinez's primary care physician board-certified in internal medicine examined her for her complaints of anxiety attacks and "a lot of stress at work." Dr. Patel has treated Ms. Martinez as her primary physician for over twenty-five years, since January 1991 through the present. Ms. Martinez complained of trouble sleeping at night due to the stress and that she had lost fifteen pounds from it. After performing a physical exam that included taking her vitals, other tests and observing Ms. Martinez, Dr. Patel diagnosed her with generalized anxiety disorder. *She prescribed a treatment plan of no work*, seeing a psychotherapist, and started her on anxiety/panic attack medication, one .5 mg tablet of Xanax daily with a refill.

22. On September 18, 2014, Dr. Patel completed Chase Bank's Short-Term Disability Certification Mental Health Form. She based her opinions in the form on her extensive history with the patient and her most recent visit, September 9, 2014. Dr. Patel concluded Ms. Martinez was unable to work from September 9, 2014 at least through October 1, 2014, at which time she would re-evaluate her. *She certified her mental disability*, noted that she was still under her care, that she had scheduled her for a follow-up visit for September 30, 2014 and that she would continue to see her monthly given her mental disability. Dr. Patel concluded Ms. Martinez was impaired from performing her work functions and stated "can't function due to stress." Dr. Patel concluded Ms. Martinez had mild to moderate anxiety and symptoms of indecisiveness. She noted that she had formally diagnosed her with anxiety, prescribed psychotherapy/ cognitive behavioral therapy, and put her on one .5 mg tablet of Xanax daily.

23. In September 2014, Ms. Martinez commenced psychotherapy with Bettye J. Isom, M.A., M.F.T., a licensed counselor, who diagnosed her with severe anxiety and depression. She continued therapy with Ms. Isom through January

2015, at which time she transitioned her ongoing therapy to Pacific Coast Healthsystems.

24. On September 23, 2014, Dr. Patel examined Ms. Martinez because she was having trouble sleeping at night and pressure behind both ears from feeling "overwhelmed." Ms. Martinez also complained of difficulty focusing and feeling hot all the time. After performing a physical exam that included taking her vitals, other tests and observing Ms. Martinez, Dr. Patel diagnosed her with generalized anxiety disorder, insomnia, otalgia (earache) and post-traumatic stress disorder. Ms. Martinez's anxiety was so severe that it was physically manifesting itself in the form of otalgia. Dr. Patel concluded that because the "patient has difficulty concentrating and [is] unable to sleep," she will start her on additional psychiatric medications including an anti-depressant, sedative and anxiety medication. Namely, she newly prescribed one 10 mg tablet of Lexapro at bedtime (an anti-depressant and anxiety medication) with a refill and ½ to one 10 mg tablet of Ambien at bedtime, a sedative because she was stricken with such severe anxiety that she could not even sleep at night.

25. On September 30, 2014, Dr. Patel examined Ms. Martinez to assess whether she could return to work. Ms. Martinez complained of the inability to sleep, "feels shaky inside," headaches, insomnia and the inability to concentrate due to stress. She noted that she was getting counseling from Bettye Isom. After performing a physical exam that included taking her vitals, a psychiatric assessment, other tests and observing that Ms. Martinez was "emotionally labile (crying and unable to function),"[3] Dr. Patel diagnosed her with: (1) Major depressive order,

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[3] Emotionally labile is a medical condition of excessive emotional reactions and frequent mood changes. *See http://medical-dictionary.thefreedictionary.com/emotional+lability*

single episode, unspecified degree; and (2) Post-traumatic stress disorder. Dr. Patel further concluded that her patient *should not work for three months* and has "psychomotor retardation and emotional" due to stress. She prescribed a treatment plan of "rest for now until mental conc[entration] improves," continuing with therapy, and a follow-up visit in four weeks. She continued her on the same psychiatric anti-depressant, sedative and anxiety medications, Lexapro, Alprazolam (*i.e.* Xanax) and Ambien.

26. On October 1, 2014, Dr. Patel completed another Chase Bank Short-Term Disability Certification Mental Health Form. Dr. Patel reported that she examined Ms. Martinez on September 9, 23[4] and 30, 2014 for her mental illness. She based her opinions on her extensive history with the patient and her most recent visit, September 30, 2014. Dr. Patel concluded Ms. Martinez's symptoms had substantially worsened. She concluded she had a depressed, anxious and angry mood, severe anxiety (increased from mild to moderate previously) causing "difficulty focusing & maintaining concentration, forgetful," and panic attacks three-to-four times per day. Dr. Patel further concluded that Ms. Martinez had the following neuro-vegetative symptoms: anhedonia (loss of capacity to feel pleasure), insomnia/hypersomnia (difficulty falling asleep and staying asleep/excessive daytime sleepiness), decreased energy, indecisiveness and poor concentration. Dr. Patel noted that she had prescribed additional psychiatric medications given Ms. Martinez's increased, severe symptoms. Namely, she increased her anxiety medication, Alprazolam (*i.e.* Xanax) to one .5 mg tablet every six hours (previously she was on one .5 mg tablet per day). She also noted that she had prescribed new medications during the patient's September 23, 2014 visit, Ambien (sedative) and

[4] Dr. Patel saw Ms. Martinez for this unplanned visit on September 23, 2014 because her anxiety and depression symptoms had significantly increased.

Lexapro (an anti-depressant and anxiety medication).

27. On October 16, 2014, Dr. Patel completed a Certificate of Medical Care. In it, she again *certified that Ms. Martinez was mentally disabled*, under her care and *could not return to work until at least January 19, 2015*.

28. On October 22, 2014, Dr. Patel completed another Chase Bank Short-Term Disability Certification Mental Health Form based on her prior mental status exams and 25 years' experience treating this patient. *She again concluded Ms. Martinez was unable to work from September 9, 2014 at least through May 19, 2015. Dr. Patel certified her mental disability for that timeframe*. Dr. Patel specifically assessed Ms. Martinez's work abilities and concluded she had the following work impairments: "becomes anxious and fearful and very emotional – cannot function," "patient unable to function on daily tasks due to panic attacks," moderately impaired for capacity to relate to others, get along with peers, manage customer requests, ability to maintain an appropriate work pace, perform sustained attention on tasks until completion, capacity for impulse control, ability to manage ongoing work expectations, and minor work impairments for ability to follow directions, complete complex tasks, capable of working on her own, generalizing knowledge to other tasks within work day. Dr. Patel reiterated her opinion, based on her prior mental status exams, that Ms. Martinez continued to have a depressed, anxious and angry mood, severe anxiety causing difficulty focusing and maintaining concentration, forgetfulness, and panic attacks three-to-four times per day, as well as the following continued neuro-vegetative symptoms: anhedonia, insomnia/ hypersomnia, decreased energy, indecisiveness and poor concentration. Dr. Patel reported that Ms. Martinez continued to take the same psychiatric anti-depressant, sedative and anxiety medications, Lexapro, Alprazolam (*i.e.* Xanax) and Ambien.

29. On October 30, 2014, Ms. Isom wrote a letter to Chase Bank's Disability Management Services which is part of Prudential's claim file. In the letter Ms. Isom confirmed, "I have been seeing Ms. Martinez for counseling for the past two months" (*i.e.* for September and October 2014). Ms. Isom concluded that Ms. Martinez has symptoms of depression, severe anxiety, often breaks into tears, has difficulty relaxing and difficulty sleeping at night. But that, despite "working hard to lessen her symptoms" and taking her prescribed medication, Ms. Martinez had been referred to a psychiatrist for further evaluation, implicitly indicating her lack of improvement.

30. On November 7, 2014, Dr. Patel examined Ms. Martinez for an "urgent/emergency situation," an unscheduled visit due to her severe depression. Ms. Martinez also complained that she was "unable to relax" due to work stress and that she has to take her anxiety medication, Xanax intermittently or she is unable to sleep despite her Ambien prescription, a sedative for her anxiety induced sleep disorder. After performing a physical exam that included taking her vitals, a psychiatric assessment, other tests and observing that Ms. Martinez was "very sad crying and can't concentrate or relax," Dr. Patel diagnosed her with: (1) Major depressive order, single episode, unspecified degree; and (2) General anxiety disorder, among others such as diabetes mellitus. She prescribed a treatment plan of seeing a psychiatrist and to continue her psychiatric medications, Lexapro, Xanax for anxiety/panic attacks and Ambien.

31. On November 12, 2014, Dr. Patel examined Ms. Martinez for her complaints of "heart beating rapidly, heavy weight on chest & feeling anxious since Sunday evening." Ms. Martinez also complained of chest pain, that she had been sobbing and could not sleep for three days, and that she was "scared about a heart attack." After performing a physical exam that included tests and observing that

Ms. Martinez was "in acute distress," Dr. Patel again diagnosed her with: (1) Major depressive order, single episode, unspecified degree; and (2) Post-traumatic stress disorder. Dr. Patel further concluded that her patient had "worsening anxiety and depression." *She prescribed a treatment plan of "no work,"* seeing a psychiatrist "asap," and rest. She also increased the dosage of Ms. Martinez's anti-depressant, Lexapro/escitalopram to one 20 mg tablet once per day with a refill (previously at 10 mg once per day). In addition, Dr. Patel kept Ms. Martinez on her other psychiatric medications, including Xanax for anxiety and panic attacks and Ambien for her anxiety induced insomnia, in addition to numerous prescriptions for her type 2 diabetes mellitus. Dr. Patel's November 12, 2014 progress notes include a copy of her prior Certificate of Medical Care, and she thus thereby reaffirmed that Ms. Martinez could not return to work, again *certifying her mental disability from working*.

32. On November 17, 2014, Ms. Martinez had an initial assessment with Parvin Afshar, M.D., a psychiatrist with Pacific Coast Healthsystems. Dr. Afshar diagnosed her with depression and generalized anxiety disorder. She further noted that Ms. Martinez had panic attacks, was unable to focus and had difficulty sleeping. Further, that she was on medical leave. She observed during the exam that Ms. Martinez had a depressed mood, that her affect was tearful and anxious. Her treatment plan included prescribing the same anti-depressant, anxiety and sedative that Ms. Martinez was currently taking, Lexapro, Xanax and Ambien, in addition to adding a new anti-depressant medication, 50 mg of Desyrel. She also referred her to weekly psychotherapy with a licensed therapist.

33. On December 1, 2014, Peter Mosbach, PhD, a clinical psychologist retained by Chase Bank performed a peer review in connection with Ms. Martinez's

STD claim to Chase.[5] ***Dr. Mosbach concluded that Ms. Martinez was disabled from performing her own occupation from a mental health standpoint from September 10, 2014 onwards.*** Specifically, he reached the following opinions:

> *The employee was functionally impaired from performing her own sedentary occupation from September 10, 2014 to present* [*i.e.* as of the date he authored his report on December 1, 2014].
>
> ***
>
> The employee is a 51year-old woman who has been diagnosed with major depression and anxiety. She is receiving psychiatric medications for depression and anxiety from her primary care physician. She is having frequent anxiety attacks which affect her ability to concentrate. Her anxiety also interferes with her ability to carry out her usual activities of daily living. She is seen on a weekly basis by a therapist in addition to receiving psychiatric medications. *Overall, the employee would have evidence of functional impairment from a mental health perspective from September 10, 2014 onwards that would prevent her from carrying out her sedentary occupation.* (Emphasis added).[6]

34. In response to Chase's question what specific impairments, if any, prevented the employee from working, Dr. Mosbach concluded, "The employee was experiencing significant levels of anxiety and had frequent panic attacks. She is also depressed. She would have difficulty maintaining pace at work. She would also

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[5] Since he was retained by Chase Bank (the employer and entity responsible to pay Ms. Martinez's STD claim), Dr. Mosbach obviously had every incentive to find that Ms. Martinez could work and was not mentally disabled from performing her occupational duties. But Dr. Mosbach concluded she was mentally disabled from working, which is strong evidence that Prudential's claim denial was in error.

[6] Based thereon, Chase Bank approved Ms. Martinez's claim for STD benefits and paid her for the maximum benefit period.

have had difficulty concentrating on work related tasks." In response to Chase's question what clinical evidence supports continued impairment from working, Dr. Mosbach concluded, "The employee is continuing to experience significant levels of anxiety. While she has shown some improvement in her symptoms, she continues to have difficulty carrying out her usual activities of daily living." Dr. Mosbach stated that his opinions are held "to a reasonable degree of clinical accuracy."

35. Dr. Mosbach reached his opinions, in part, based upon reviewing Ms. Martinez's medical records and his November 25, 2014 conversation with her therapist, Ms. Isom. Ms. Isom advised that it was her opinion after treating Ms. Martinez for months on a weekly basis for psychotherapy that Ms. Martinez could not even perform usual activities of daily living (let alone work activities) due to significant anxiety:

> She stated that the employee is being seen on a weekly basis for psychotherapy. She is prescribed Lexapro for depression and Ambien for a sleep disorder. She stated that the employee was reporting having panic attacks and memory problems. She appeared to be anxious during her therapy sessions. *Ms. Isom felt that the employee would have difficulty carrying out her usual activities of daily living due to her anxiety attacks.* She stated that the employee has shown some improvement, but continues to have evidence of significant anxiety. (Emphasis added).

36. On December 15, 2014, Dr. Afshar had her monthly session with Ms. Martinez to check her medications. She noted that the patient still complained of poor sleep. Dr. Afshar's treatment plan included continued weekly psychotherapy and prescribing the same medications, except that she increased the Desyrel to 100

mg.

37. On December 23, 2014, Dr. Patel completed a STD Update Report for Chase Bank and, once again, certified Ms. Martinez's mental disability from working. She responded "Yes" to Chase's question "Does the employee remain unable to work at this time? Dr. Patel concluded that her patient would be **unable to work through May 25, 2015**, filling in that date in response to Chase's pre-printed question of "Estimated Return to Work Date." She noted that she had been treating Ms. Martinez once per week for her mental illness since September 9, 2014. Based upon her personal exams, she reaffirmed her diagnosis of major depressive order, single episode (296.20) and concluded Ms. Martinez had a Global Assessment of Functioning ("GAF") score of 51, meaning she had moderate symptoms of mental illness and that her ability to function at work is moderately impaired but close to the severely impaired end of the GAF spectrum.[7]

38. In the STD Update Report, Dr. Patel opined that her patient has the following current impairments/symptoms that prevent her from working: depression, tearfulness, agitation, difficulty focusing and concentrating, wakes several times during the night, and feels tired. When asked on Chase's pre-printed form whether Ms. Martinez is "capable of accepting responsibility for tasks in workplace," Dr. Patel responded "no." She concluded that Ms. Martinez has the following moderate work impairments, defined by Chase Bank to mean that she could only occasionally perform the functions: remember and adhere to usual

[7] GAF stands for "Global Assessment of Functioning." The GAF is a scale from 0 to 100 where higher scores indicate greater levels of functioning. Optimal mental health and coping capabilities are represented by scores in the 91 – 100 range. Persons with mild psychological problems fall in the 71 – 90 range. Serious problems fall in the 41 – 50 range. The GAF rating is made as a standard part of all psychiatric/psychological diagnoses. A GAF score between 51 and 60 means moderate symptoms of mental illness are present, or that a person's functioning in school, work, or social situations is moderately impaired.
See https://www.mentalhelp.net/advice/what-does-gaf-stand-for/

workplace rules, maintain work focus/concentration in spite of usual disruptions, organize and sustain energy to attend work regularly and timely, sustain realistic energy through a regular workday, sustain energy to follow through and complete tasks timely, relate to others without undue irritability, maintain stable relationships in the face of usual stresses, sustain thinking and focus in the face of usual stresses, contain behavior despite frustration or negative feedback, take responsibility for errors and omissions, deal realistically with others errors and demands, make use of/ control responses to supervisory feedback, maintain performance in significant organizational stress/change, set appropriate boundaries on authority and relationships, effectively organize completion of multiple tasks at the same time, delay responses when appropriate. She concluded that Ms. Martinez has the following mild-to-moderate work impairments: ability to maintain appropriate work pace, remain on task until completed. She concluded that Ms. Martinez has the following mild work impairments, defined by Chase Bank to mean that she could usually perform the functions but sometimes was impaired: comprehend and follow instructions, maintain focus/concentration despite usual stresses, able to complete tasks, communicate appropriately socially in appearance, speech and actions, take responsibility for solving routine work problems, take responsibility for effect of behavior and productivity on others, make effective independent decisions, organize and manage projects and/or processes independently, capable of working on her own.

39. On January 6, 2015, Dr. Patel again examined Ms. Martinez. She complained that she is “still emotional and can’t sleep or focus” and advised that she was going to cognitive behavioral therapy. After performing a physical exam that included a psychiatric assessment, other tests and observing that Ms. Martinez was “emotionally labile (when questioned about her stress),” Dr. Patel diagnosed her with general anxiety disorder. She noted that Ms. Martinez was to continue her

psychiatric medications, Lexapro, Xanax, Ambien and now also 100 mg of Trazodone (another anti-depressant).

40. On January 13, 2015, as noted above, Ms. Martinez transitioned her ongoing psychotherapy to Poonam Nina Banerjee, PhD, a licensed clinical neuropsychologist with Pacific Coast Healthsystems. Dr. Banerjee treated Ms. Martinez for psychotherapy on a regular basis, including on January 13, 20, February 5, 17 and March 10, 2015. In each progress note, Dr. Banerjee recorded that she worked on decreasing Ms. Martinez's depressed mood, and she recorded Ms. Martinez's functional impairments.

42 On January 15, 2015, Chase Bank submitted its part of Prudential's LTD claim form, indicating that Ms. Martinez had been medically diagnosed with major depressive affective disorder – recurrent episode and unspecified degree anxiety.

43. On January 16, 2015, Dr. Afshar had her monthly session with Ms. Martinez to check her medications. She concluded that the patient was "still anxious." Dr. Afshar's treatment plan included continued weekly psychotherapy and prescribing the same medications, Lexapro, Desyrel and Xanax.

44. On January 27, 2015, Dr. Banerjee completed Chase Bank's Short-Term Disability Certification Mental Health Form. She based her opinions in the form on her most recent visits, January 13 and 20, 2015. Dr. Banerjee diagnosed Ms. Martinez with: (1) Generalized anxiety disorder; and (2) Major depression (296.33 – the DSM-IV-Code for severe depression, recurrent episodes). *Thus, Dr. Banerjee concluded that Ms. Martinez was severely depressed, not mildly or*

moderately, but the most extreme on the DSM diagnosis code spectrum.[8] ***Dr. Banerjee further concluded Ms. Martinez was unable to work at least from the time she commenced treating her through May 1, 2015***, at which time she would re-evaluate her. *She certified her mental disability*, noted that she had scheduled her for a follow-up visit for February 5, 2015 and that she would continue to see her bi-weekly given her mental disability. Dr. Banerjee specifically assessed Ms. Martinez's work abilities and concluded Ms. Martinez was impaired from performing her work functions because of her "depression symptoms such as crying spells and impaired ability to concentrate" and her "symptoms of anxiety such as chest pain and panic attacks." She stated that Ms. Martinez was experiencing two-to-three panic attacks weekly and that moderate anxiety also prevented her from performing her job functions. In addition to the above, Dr. Banerjee concluded Ms. Martinez also had the following work impairments: moderately impaired for ability to maintain an appropriate work pace, perform sustained attention on tasks until completion, and minor work impairments for capacity to relate to others, get along with peers, manage customer requests, ability to follow directions, complete complex tasks, capacity for impulse control, ability to manage ongoing work expectations. Dr. Banerjee reiterated her opinion, based on her prior therapy sessions, that Ms. Martinez continued to have a depressed and anxious mood, a dysphoric affect, avoidant behavior, as well as the following continued neuro-vegetative symptoms: irritability, anhedonia, decreased energy, indecisiveness and poor concentration.

45. On February 2, 2015, Dr. Afshar had her monthly follow-up with Ms. Martinez. Dr. Afshar prescribed continued weekly psychotherapy with Dr. Banerjee and re-filled the same psychiatric medications, Lexapro, Desyrel, Xanax and

[8] *See http://psychcentral.com/disorders/dsm-iv-diagnostic-codes/#recurrent*.

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Ambien.

46. On February 5, 2015, Dr. Banerjee treated Ms. Martinez in psychotherapy. She concluded that her patient was still having a depressed mood, and that her feelings of hopelessness and helplessness impaired her functional ability.

47. On February 13, 2015, while Ms. Martinez was still unable to work from her mental illness, she began having right knee pain (which she reported to Prudential). Dr. Patel examined Ms. Martinez on that date and confirmed the problems in her right knee. She complained to Dr. Patel that she had right knee pain when bending her leg. After performing a physical exam that included taking her vitals, a psychiatric assessment, other tests and observing that Ms. Martinez was "still emotional and has difficulty with her concentration," Dr. Patel diagnosed her with general anxiety disorder and major depressive disorder. She prescribed a treatment plan of continuing to see her cognitive behavioral therapist and psychiatrist for her depression and anxiety, and to follow-up with her chiropractor for her knee pain. She noted that Ms. Martinez was to continue her psychiatric medications, Lexapro, Trazodone, Xanax and Ambien.

48. On February 14, 2015, Ms. Martinez treated with her long-time chiropractor, William M. Thomas, DC for her right knee and right shoulder pain. She had follow-up visits to treat the same conditions on February 17, 2015, February 28, 2015, March 7, 2015, April 4, 2015, June 15, 2015, July 8, 2015, October 2, 2015 and May 18, 2016. She also started treating for low back pain and right foot pain on October 2, 2015. Dr. Thomas' progress notes and medical records reflect that Ms. Martinez consistently experienced severe pain in her right knee of eight-to-nine on a scale of one-to-ten and loss of strength during her visits with him,

in addition to right shoulder and later right foot and low back pain.

49. On February 27, 2015, Ms. Martinez submitted her LTD claim forms to Prudential and reported that anxiety and depression prevented her from working. She stated that she could not concentrate or focus due to these conditions which interfered with her ability to do her job. As part of the claim forms, Dr. Patel completed Prudential's Attending Physician Statement ("APS") at its request on the same date. Dr. Patel diagnosed Ms. Martinez in the APS with generalized anxiety disorder (300.02). Dr. Patel noted her treatment plan included "rest and see therapist," in addition to her current medications of Ambien (sedative for sleep), Lexapro/ escitalopram and Trazodone (both antidepressants). She noted that her patient continued to treat with a psychiatrist, Dr. Afshar, and a psychotherapist, Poonam Banerjee, PhD, and that she also had just treated her patient on February 13, 2015 and had a future visit scheduled on May 20, 2015.

50. Ms. Martinez also applied for Social Security Disability Insurance ("SSDI") benefits from the Social Security Administration ("SSA").

51. On March 2, 2015, Dr. Afshar had her monthly follow-up with Ms. Martinez. Dr. Afshar's treatment plan included continued weekly psychotherapy and re-filling the same psychiatric medications, Lexapro, Desyrel, Xanax and Ambien. *Dr. Afshar noted that Ms. Martinez's medications were "stable," meaning that she was not experiencing side effects or intolerant to the medications requiring a change of medication. In Dr. Afshar's opinion, Ms. Martinez was not ready to resume work at that time.*[9] In fact, Dr. Afshar continued treating Ms. Martinez on a

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[9] As explained later, Prudential's peer reviewer misinterpreted Dr. Afshar's "stable" comment. Dr. Afshar clarified in her June 13, 2016 letter what she meant by "stable" in her progress note and, further, that by "stable" she absolutely did not mean that Ms. Martinez was ready to resume work as of March 2, 2015.

monthly basis after March 2, 2015 through the present, including on April 13, 2015, May 11, 2015, June 8, 2015, July 20, 2015, August 24, 2015, September 21, 2015, October 19, 2015, November 16, 2015, December 4, 2015, January 11, 2016, February 8, 2016, March 7, 2016, April 4, 2016, May 2, 2016, June 3, 2016 and continuing. Each of the progress notes show that Dr. Afshar renewed Ms. Martinez's same psychiatric medications, *i.e.* Lexapro, Desyrel, Xanax and Ambien, and, in some instances, increased her dosages or prescribed new medications because Ms. Martinez was still experiencing severe symptoms.

52. As of Ms. Martinez's last psychotherapy session with Dr. Banerjee on March 10, 2015, Dr. Banerjee concluded that her patient was still having a depressed mood, "work problems," and family dynamics that impaired her functional ability. At that time, her psychotherapy transitioned to another licensed therapist at Pacific Coast Healthsystems, Robert H. Thompson, LCSW.[10]

53. On March 24, 2015, Richard Chambers, M.D., Ms. Martinez's attending orthopedic surgeon had an initial consult with her for the significant knee pain she had been experiencing since February 2015. Ms. Martinez complained of "pain when walking." Dr. Chambers performed objective tests and noted "max tenderness" at the medial joint line in her right knee. He scheduled a follow-up visit to review the MRI that had been scheduled by her chiropractor.

54. On March 29, 2015, Ms. Martinez had an MRI on her right knee as referred by her chiropractor, William M. Thomas, DC, because she starting experiencing significant pain in her knee in February 2015. The MRI revealed a "tear of the posterior horn of the medial meniscus," chondromalacia patella

[10] Ms. Martinez changed to Mr. Thompson in part because Dr. Banerjee was busy and had to cancel several therapy appointments. That contributed to the lapse in therapy sessions during the transition.

(cartilage under kneecap deteriorated causing chronic knee pain), a joint effusion (abnormal fluid in joint from inflammation or trauma), as well as fluid collection representing bursitis (inflammation of bursa sac which decreases friction).

55. On April 7, 2015, Dr. Chambers had a follow-up exam to review the results of Ms. Martinez's knee MRI. She reported right knee pain with any weight bearing for the last three months (since early 2015) that is not improving. Dr. Chambers reviewed the films, determined they were abnormal and diagnosed her with a medial meniscus tear and chondromalacia patella of the right knee. He performed objective tests and physically examined her knee and again concluded she had maximum tenderness in her knee. He concluded Ms. Martinez "may need arthroscopy in the future" for the meniscus tear and also prescribed home exercises for her chondromalacia patella condition. Dr. Chambers regularly saw Ms. Martinez thereafter, on June 9, 2015, September 8, 2015, February 2, 2016, March 14, 2016 and April 14, 2016, which culminated with him performing right knee surgery on April 15, 2016, as well as post-operation visits of April 25, 2016 and May 9, 2016. The progress notes consistently confirm that, in Dr. Chambers' opinion, Ms. Martinez had a torn medial meniscus and chondromalacia of the patella in her right knee likely from January/February 2015 until her surgery causing significant pain/ "max tenderness," worse with prolonged standing and walking, which would require surgery and eventually did, which opinion he based upon objective MRI images, numerous physical exams and other objective palpation tests.

56. On April 10, 2015, Prudential denied Ms. Martinez's claim for LTD benefits. It reasoned "no benefits are payable" because "the information in your file does not support impairment that would prevent you from performing [the] material and substantial duties of your regular occupation" as of March 3, 2015. Prudential used its employee psychiatrist, Kevin Hayes, M.D. to review Ms. Martinez's

medical records and reasoned: "Based on the medical review [by Dr. Hayes] of the records in your file, we find that you were stable psychiatrically by March 3, 2015 and able to resume work activities."[11]

57. Prudential and its "paper peer reviewer," Dr. Hayes relied upon two main pieces of evidence in denying the claim. First, Dr. Hayes referenced a comment in the treating psychiatrist, Dr. Afshar's March 2, 2015 illegible progress note that said "stable" and concluded based thereon that Ms. Martinez could resume working as of that date. Second, Prudential claims that Dr. Hayes spoke with Ms. Martinez's primary care physician, Dr. Patel, and that Dr. Patel agreed in that conversation that Ms. Martinez was stable and could resume work as of March 2, 2015. Neither are true. Based upon reviewing Ms. Martinez's medical records and these two false assumptions, Dr. Hayes concluded, "Impairment supported from last day worked [9/10/14] through 3/2/15 . . . By this date, symptom resolution is noted." Thus, Prudential's own psychiatrist consultant agreed that Ms. Martinez was disabled from working from September 10, 2014 through March 2, 2015.

58. In its denial letter, Prudential quoted the Policy's 182-day Elimination Period, *i.e.* that Ms. Martinez is not entitled to disability benefits unless she is "continuously disabled throughout your Elimination Period," which ran from September 10, 2014 through March 11, 2015 in Ms. Martinez's case. The implicit reason of Prudential's denial is thus that, while Ms. Martinez was disabled from September 10, 2014 through March 2, 2015, she was not disabled for long enough because she purportedly did not satisfy the Elimination Period and, therefore, is not entitled to disability benefits.

59. Prudential, in its cursory denial letter, did not express any other reasons

[11] Dr. Hayes did not perform an in-person exam or speak with Ms. Martinez.

for denying the claim. It did not identify or even discuss Ms. Martinez's occupational duties, nor did it discuss her voluminous medical records (summarized hereinabove) other than a sentence or two. It did not mention or distinguish Chase Bank's decision to award Ms. Martinez STD benefits (based on its finding that she was disabled due to depression and anxiety). Prudential's cursory denial letter is obviously deficient and incorrect for the reasons explained later.

60. On May 11, 2015, Dr. Afshar continued to treat Ms. Martinez in a psychiatric session and increased her Desyrel dosage to 150 mg, as reflected in her progress notes. She also refilled all her existing anti-depressant and anxiety medications. She recorded that the patient "still has poor sleep." Obviously, Ms. Martinez was not "stable" in the sense that Dr. Hayes interpreted Dr. Afshar's March 2, 2015 progress notes as she continued to treat her for disabling depression and anxiety (and still does to this present day).

61. On May 26, 2015, Dr. Patel examined Ms. Martinez for a review of her psychiatric medications, among other things. She complained that she is "still anxious, unable to concentrate," and very emotional. She advised Dr. Patel that she is still seeing her psychiatrist, Dr. Afshar and her psychologist. Ms. Martinez further advised Dr. Patel that she saw an orthopedic surgeon for her right knee pain, Dr. Chambers and that he diagnosed her with a torn meniscus following an MRI. Ms. Martinez stated that she used to be able to walk two miles but cannot walk for prolonged periods anymore because of her knee pain. After performing a physical exam that included taking her vitals, a psychiatric assessment, other tests and observing that Ms. Martinez was "emotionally labile (starts crying)" and wearing a right knee brace, Dr. Patel re-diagnosed her with general anxiety disorder, among other things, just as she had done during her initial September 2014 visit and each and every visit thereafter. Dr. Patel's treatment plan included "continue present

medications, continue cognitive behav[ioral] therapy" and agreeing that she should continue seeing Dr. Chambers for her orthopedic problems such as her right knee. Dr. Patel noted that Ms. Martinez was to continue her active psychiatric medications for depression and anxiety, escitalopram/Lexapro, Alprazolam/Xanax and Trazodone/Desyrel.[12]

62. On June 8, 2015, Dr. Afshar treated Ms. Martinez in a psychiatric session and increased her Xanax dosage, as reflected in her progress notes. She also refilled all of her existing anti-depressant and anxiety medications, *i.e.* her Lexapro and Desyrel. Dr. Afshar concluded that Ms. Martinez is "still anxious, restless, depressed."

63. On June 9, 2015, Dr. Chambers recorded in his progress notes that Ms. Martinez's knee pain "is worse with prolonged standing, walking and with stairs."

64. On July 5, 2015, Ms. Martinez had an MRI on her right shoulder as referred by her chiropractor, Dr. Thomas, because she had continued to experience significant pain in her shoulder since February 2015. The MRI revealed "moderate narrowing of subacromial space."

65. On August 24, 2015, Dr. Afshar treated Ms. Martinez in a psychiatric session and increased her anti-depressant Desyrel dosage, as reflected in her progress notes. She also refilled all of her other existing anti-depressant and anxiety medications. Dr. Afshar concluded that Ms. Martinez is still having "poor sleep."

66. On August 28, 2015, Dr. Patel examined Ms. Martinez. She

[12] Dr. Patel's medical records corroborate that Ms. Martinez continued to have disabling psychiatric problems after March 2, 2015, contrary to what Prudential's psychiatrist peer reviewer consultant concluded.

complained of anxiety and depression, that she "still has trouble sleeping," and advised that she was with the same psychiatrist but was changing her psychologist/therapist to Robert Thompson. After performing a physical exam that included a psychiatric assessment, other tests and observing that Ms. Martinez was "emotionally labile," Dr. Patel again diagnosed her with general anxiety disorder and major depressive disorder, among other things. She noted that Ms. Martinez was to continue her active psychiatric medications for depression and anxiety, escitalopram/Lexapro, Alprazolam/Xanax and Trazodone.

67. On September 2, 2015, Ms. Martinez had her initial consultation and psychotherapy session with Robert H. Thompson, LCSW, another licensed therapist with Pacific Coast Healthsystems (after previously seeing both Dr. Afshar and/or Dr. Banerjee regularly since November 2014 and January 2015, respectively, a psychiatrist and psychologist with Pacific Coast Healthsystems). Thompson interviewed Ms. Martinez about her life, family and work situation. He noted that she was divorced with children and "her job is a business liaison for Chase Banking." He observed during the therapy session that Ms. Martinez "has [increased] emotionality as she easily tears up." He spoke with the Pacific Coast psychiatrist, Dr. Afshar and learned that the patient was on an anti-depressant as well as Trazadone for sleep and Xanax for anxiety. He further noted that the patient has been off work "for nearly 1 year due to severe anxiety, panic attacks and depression." He noted that Ms. Martinez "continues to have panic attacks even though Dr. Afshar has upped the dosage on [her] anti-depressant." Based on his exam and the information from Dr. Afshar, therapist Thompson diagnosed Ms. Martinez with recurrent major depressive disorder (296.3) and panic disorder (300.01), and also concluded that she "feels ill prepared at present to return to her work."

68. On September 8, 2015, Dr. Chambers recorded in his progress notes that Ms. Martinez now gets a "sudden onset of intense pain with no particular activity" in her knee, not just when she is walking and standing. He noted that the patient wants surgery and his assessment plan included "arthroscopy possible meniscectomy."

69. On September 9, 2015, therapist Thompson had a follow-up with Ms. Martinez. Thompson continued treating Ms. Martinez on a weekly basis for psychotherapy thereafter through the present, including on September 9, 2015, September 16, 2015, September 23, 2015, October 7, 2015, October 14, 2015, October 21, 2015, November 4, 2015, November 11, 2015, November 17, 2015, November 24, 2015, December 2, 2015, December 9, 2015, December 30, 2015, January 6, 2016, January 13, 2016, February 24, 2106, March 2, 2016, March 9, 2016, March 16, 2016, March 23, 2016, April 16, 2016, May 11, 2016, May 18, 2016, May 25, 2016, June 1, 2016, June 8, 2016, June 15, 2016, June 30, 2016 and continuing (a total of twenty-nine exams/psychotherapy sessions as of mid-2016). In each progress note, Thompson recorded Ms. Martinez's mental health (and sometimes physical health) symptoms and contributing factors and documented that he worked on improving her severe depression, anxiety and panic attacks. Thompson recorded Ms. Martinez's complaints of knee pain during the September 9, 2016 session, as reflected in the progress notes.

70. On September 16, 2015, Thompson treated Ms. Martinez for severe, disabling depression, anxiety, panic attacks and resulting insomnia in a psychotherapy session. He further noted "patient due for [knee] surgery in the next 6 weeks."

71. On September 17, 2015, Ms. Martinez appealed Prudential's claim

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denial and submitted additional medical records, namely, the March 29, 2015 and July 5, 2015 MRIs of her right knee and shoulder, respectively, referenced above. Ms. Martinez advised Prudential that she continued to suffer from depression, anxiety, panic attacks, poor concentration and loss of sleep requiring current prescriptions of anti-depressants and anxiety medication, Trazadone/Desyrel (150 mg), Lexapro/escitalopram/ (20 mg), and Alprazolam/Xanax (.5 mg). Her Trazadone prescription dosage had significantly increased indicating her depression had worsened. While she was still disabled from her mental disorder that had continuously prevented her from working since September 2014, she advised Prudential that a fall at work at Chase Bank in 2013 where she injured her right knee and shoulder had progressively deteriorated to the point that she was in substantial pain starting in February 2015 and would now require meniscus surgery. She made a claim for all these conditions, including that she could not work due to these conditions affecting her "physical and mental health."

72. On September 21, 2015, Dr. Afshar treated Ms. Martinez in a psychiatric session and started her on a new anti-depressant/anti-psychotic medication for patients experiencing severe depression with psychotic symptoms, Abilify.[13] She also refilled all her other existing anti-depressant and anxiety medications. Dr. Afshar concluded that Ms. Martinez is still depressed.

73. On September 23, 2015, Thompson treated Ms. Martinez for severe, disabling depression, anxiety, panic attacks and resulting insomnia in a psychotherapy session. He further noted "patient has increased anxiety over past 2 days" and worries. Licensed *therapist Thompson concluded Ms. Martinez was still*

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[13] Abilify (aripiprazole) is an antipsychotic medication. Abilify is used to treat the symptoms of psychotic conditions such as schizophrenia and bipolar I disorder (manic depression) and is also used together with other medicines to treat major depressive disorder in adults. *See https://www.drugs.com/abilify.html*

disabled from performing her occupation at Chase Bank ***as of September 2015***. He based his opinion on his continuing weekly psychotherapy sessions with her and his discussions with her psychiatrist, Dr. Afshar, whom he works closely with at Pacific Coast Healthsystems. Specifically, he opined:

> When seen [on] 9/2/15 Dora had continued Panic Attacks and Major Depression. *She remained unable to return to her position she has with Chase.* I diagnosed Dora with Panic and Major Depression. Both diagnostic descriptions which fall under the *seriously mentally ill* umbrella.
>
> ****
>
> *At this time Dora is more disabled than initially. I find it hard to understand why her disability insurance has been cut off.* (Emphasis added).

74. Thompson also noted that Ms. Martinez commenced treatment with Dr. Afshar on November 17, 2014 and that she has met with her on a monthly basis ever since (*i.e.* through the date of his opinion report, September 23, 2015). Thompson noted that, based thereon, Dr. Afshar had diagnosed her with generalized anxiety disorder and depression, and that she was consistently treated with Lexapro, Trazadone and Xanax, during that entire time frame. Thompson also noted Ms. Martinez's physical health problems, including that she has met with an orthopedic surgeon who plans to perform surgery on her right knee.

75. On September 30, 2015, Dr. Chambers, Ms. Martinez's attending orthopedic surgeon stated to Prudential in a letter, "Ms. Martinez is an ongoing patient of mine being treated for medial meniscus tear of the right knee. She was initially seen on 3/24/2015 and most recently on 9/28/2015. At this time she is

pending arthroscopic surgery for repair of meniscal tear."

76. On October 2, 2015, Ms. Martinez treated with her chiropractor, Dr. Thomas for her knee and shoulder pain and, also commenced treatment for pain in her right foot and low back.

77. On October 6, 2015, Dr. Thomas advised Prudential that Ms. Martinez had been his ongoing patient since 2003 but renewed treatment when she starting experiencing continuing pain in her right knee and shoulder in 2015. He therefore referred her for the MRI evaluations noted above (in March and July 2015). Dr. Thomas concluded that the MRIs showed that her right "knee was positive for a torn medial meniscus" and her right "shoulder was positive for degenerative changes" causing Ms. Martinez continuous knee pain of 8-to-9 out of 10 and shoulder pain of 6-out-of-10, with 10 being "unbearable pain." Dr. Chambers informed Prudential that he had thus referred his patient to an orthopedic surgeon.

78. On November 2, 2015, Ms. Martinez had an x-ray on her right foot as referred by her chiropractor, Dr. Thomas, to evaluate for a stress fracture because she started experiencing significant pain in her right foot in October 2015. The x-ray was negative for a fracture but showed a mild hallux valgus deformity of the first metatarsophalangeal joint in her right foot, which was abnormal.

79. On December 1, 2015, therapist Thompson reiterated many of the same opinions he had expressed in his September 23, 2015 report. He reported that Ms. Martinez, since September 2015 when he started treating her, had continued weekly psychotherapy with him and was on the same psychiatric anti-depressant and anxiety medications, Lexapro, Trazadone/Desyrel and Xanax. Based on his numerous, weekly in-person exams and therapy sessions, he concluded again that

Ms. Martinez *was still disabled from performing her occupation at Chase Bank* ***as of December 2015***, noting that she "is clearly unable to function at her position." Thompson concluded that Ms. Martinez had the following functional limits and symptoms: panic attacks, neuro-vegetative symptoms of "major depression," excessive worry, loss of interest, feelings of hopelessness and helplessness, diminished ability to concentrate, "fearful of committing banking errors," "in bed for prolonged periods," and does not shower or dress for up to three days. Thompson noted Ms. Martinez's other ongoing physical health problems, upcoming surgery on her knee and possibly her shoulder.

80. On December 9, 2015, during one of Thompson's ongoing weekly psychotherapy sessions (where he continued to treat Ms. Martinez for severe, disabling depression, anxiety, panic attacks and resulting insomnia), he documented in his progress note: patient has "paranoia while waiting out back at home. She fears attack when in shower."

81. On December 15, 2015, Prudential retained a board-certified orthopedic surgeon to review Ms. Martinez's LTD claim as it pertained to her physical ailments, David H. Trotter, M.D., and a psychiatrist as it pertained to her mental disorders, Eric M. Chavez, M.D. Prudential retained and relied upon these two medical consultants for its appeal review and to support its eventual appeal denial. Dr. Chavez is part of MES Peer Review Services ("MES").

82. On December 23, 2015, after reviewing Ms. Martinez's medical records including without limit the MRIs of her knee and shoulder, Dr. Trotter wrote a peer review report of his opinions. *Prudential's own medical consultant concluded Ms. Martinez had the following medically necessary functional restrictions and limitations from working, among others: "the limitations for the*

knee are no standing and/or walking up to 45 minutes at a time and no more than 2 hours combined in an 8 hour day;" and right shoulder "limitations are only occasional over the shoulder reaching and occasional lifting and carrying up to 10 pounds and pushing, pulling up to 20 pounds." Dr. Trotter concluded Ms. Martinez's knee limits started on February 3, 2015 and continued at least through the date of his December 23, 2015 report (and likely thereafter since he noted that the medical records confirmed plans for future right knee surgery to repair Ms. Martinez's torn meniscus confirmed by the MRI). Namely, Dr. Trotter stated, "The first mention of the claimant's knee pain was an appointment with her internal medicine physician on 2/3/15 in which she stated she fell at work and bent her knee the wrong way. The claimant complained of pain in the medial part of the knee."

83. Dr. Chavez wrote a peer review report in December 2015 for Prudential. He concluded based purely on a review of Ms. Martinez's medical records, without ever examining her or speaking with her or any of her physicians, that she was mildly depressed and anxious but that there was not sufficient medical evidence in her file to support any psychiatric impairments or medical work restrictions and limitations at any time from September 2014 onward. Prudential's new psychiatrist consultant for the appeal, Dr. Chavez, directly contradicted the opinion of Dr. Hayes, Prudential's own employee psychiatrist that it used to deny her initial claim. He explicitly stated in his report, "My opinion differs from the assessment of Dr. Hayes . . . [that] the claimant did have psychiatric impairments from 9/10/14 until 3/2/15." Dr. Chavez reasoned that the medical records failed to document "severe symptoms" like "psychosis," "risk to self," "hospitalization" or referral to "a psychiatric intensive outpatient program." Dr. Chavez arbitrarily required a minimum threshold that, for Ms. Martinez to be considered disabled from working, she must be suicidal, psychotic/ delusional or confined to a mental hospital, none of which are required by Prudential's group policy.

84. Thereafter, as before, therapist Thompson and Dr. Afshar, her psychiatrist, continued to regularly treat Ms. Martinez on a weekly and monthly basis, respectively, for severe, disabling depression, anxiety, panic attacks and resulting insomnia.

85. On January 6, 2016, Prudential reaffirmed its claim denial and rejected Ms. Martinez's September 17, 2015 (first) administrative appeal of Prudential's claim decision. It based its decision primarily upon the opinions of its two medical consultants for the appeal, Drs. Chavez and Trotter (abandoning the opinion of Dr. Hayes without explanation). Prudential again reasoned "the information in your file does not support impairment that would prevent you from performing [the] material and substantial duties of your regular occupation." Relying on Dr. Chavez's opinion, Prudential concluded Ms. Martinez had no restrictions and/or limitations from a psychiatric condition from the time she reported her claim in September 2014 through the present (despite that its own in-house psychiatrist, Dr. Hayes had already concluded the opposite from September 2014 to March 2, 2015). While Prudential agreed that Ms. Martinez does have physical restrictions and limitations from her knee and shoulder conditions that would prevent her from working, it concluded that since those impairments did not begin until February 2015 it could not consider them because she had already lost coverage under the Policy by that date.

> The reviewer [Dr. Trotter] concluded that you would have restrictions/ limitations due to your knee condition; however, these would not have been in effect until you first received treatment for your knee pain on February 3, 2015.

Prudential reasoned that since Ms. Martinez was not in "active employment" nor did she have any disabling conditions from September 2014 until February 2015 (directly contradicting its April 2015 denial), she had already lost coverage under the Policy when her knee condition commenced and, therefore, was not entitled to LTD benefits.

86. Just as in its initial denial letter, Prudential in its appeal denial failed to identify or even discuss Ms. Martinez's occupational duties. Again, it did not mention or distinguish Chase Bank's decision to award Ms. Martinez STD benefits (based on its finding that she was disabled due to depression and anxiety).

87. As discussed above, and for the reasons explained below, the medical and other evidence, including from Prudential's own psychiatrist consultant, patently contradicts Prudential's erroneous conclusion that Ms. Martinez was not disabled from performing the material and substantial duties of her regular occupation. The reasons stated in Prudential's claim denials are wrong.

88. On January 11, 2016, Dr. Afshar treated Ms. Martinez in a psychiatric session and refilled her anti-depressant and anxiety medications, and continued to do so monthly through the present.

89. On January 13, 2016, Thompson treated Ms. Martinez for severe, disabling depression, anxiety, panic attacks and resulting insomnia in a psychotherapy session, and continued to do so weekly through the present.

90. On February 2, 2016, Dr. Chambers had a consult with Ms. Martinez for her ongoing right shoulder and right foot pain. She had been seeing her chiropractor and taking Ibuprofen for that pain. Dr. Chambers reviewed her July 5, 2015 MRI and determined the results were abnormal, showing joint arthritis in her

right shoulder. He physically examined her and performed objective palpation and range of motion tests which confirmed diffuse tenderness in her right shoulder and significantly decreased range of motion. Dr. Chambers diagnosed her with osteoarthritis in her right shoulder, referred her to 4 weeks of physical therapy, two times per week, and prescribed pain medication, Voltaren.

91. On February 8, 2016, Dr. Patel examined Ms. Martinez for her right knee pain, mental health and other issues. After performing a physical exam that included a psychiatric assessment, other tests and observing that Ms. Martinez was "emotionally labile" and "still emotional but goes to" cognitive behavioral therapy, Dr. Patel re-diagnosed her with major depressive disorder and general anxiety disorder, just as she had done during her initial September 2014 visit and each and every visit thereafter. Dr. Patel's treatment plan included continue anti-depressants, continue cognitive behavioral therapy and to walk as best she could for her diabetes and cholesterol (as well as to take Crestor). Dr. Patel specifically noted that Ms. Martinez was to continue her active psychiatric medications for depression and anxiety, escitalopram/Lexapro, Alprazolam/Xanax and Trazodone/Desyrel.

92. On February 8, 2016, Chase Bank terminated Ms. Martinez's employment effective the following day, February 9, 2016. Ms. Martinez confirmed to Chase at that time that she is not able to return to work and does not know when she will be able to return given her disabilities. This corroborates that Ms. Martinez is disabled. She certainly would not have left her high-paying job with a $90,260 annual salary if she was able to perform her job duties. She had no other job or source of income. She was and is completely out of work; Prudential denied her LTD claim; nor had she been awarded any public disability benefits at that time. The termination letter further evidences that her employer does not believe she is able to adequately perform her job duties or it would not have terminated her.

93. On March 7, 2016, Dr. Afshar treated Ms. Martinez in a psychiatric session and refilled her anti-depressant and anxiety medications, noting that she was on Lexapro, Desyrel/Trazadone and Xanax. Dr. Afshar concluded that Ms. Martinez "still [experiences] poor sleep" and thus increased her Desyrel dosage.

94. Dr. Chambers' progress notes of March 14, 2016 confirm Ms. Martinez continued to have significant pain in her right shoulder, that she could not lift it, as confirmed by objective palpation and range of motion tests, and that he prescribed the same treatment and noted the need for a possible cortisone injection. Further, that Ms. Martinez continued to have significant pain in her foot, especially with pressure and walking.

95. On March 23, 2016, Thompson continued to treat Ms. Martinez weekly for severe, disabling depression, anxiety, panic attacks and resulting insomnia in a psychotherapy session. He also noted in his progress notes patient has symptoms of paranoia. She gave her social security number to her physical therapist and now has "doubts" and "couldn't sleep at night after giving" the number out.

96. On April 11, 2016, Dr. Patel examined Ms. Martinez and cleared her for right knee surgery with Dr. Chambers in a pre-operative visit. He noted that his patient would have arthroscopic surgery of her right knee to repair her right medial meniscus on April 15. Dr. Patel noted that Ms. Martinez has experienced right knee pain for over one year and that an MRI confirmed the meniscus tear. Dr. Patel performed objective tests and concluded she had tenderness in the medial part of her right knee. She diagnosed her with tear of medial meniscus of right knee. Dr. Patel also diagnosed Ms. Martinez with ongoing major depressive disorder commencing 2014 through the present. She stated that her patient has ongoing depression, anxiety and panic attacks and continues to see a psychiatrist, Dr. Afshar, and

Thompson for cognitive behavioral therapy. She recorded in her progress notes that Ms. Martinez's active medications included anti-depressants and anxiety medications, Trazodone/ Desyrel, escitalopram/ Lexapro and Alprazolam/ Xanax.

97. On April 14, 2016, Dr. Chambers recorded in his progress notes that Ms. Martinez was here for a pre-operation evaluation for her right knee surgery. He put her on Codeine and noted again her "maximum tenderness" in her right knee upon palpation, which she had experienced since his initial knee consult in March 2015.

98. On April 15, 2016, Dr. Chambers operated on Ms. Martinez's right knee, a diagnostic video arthroscopy under general anesthesia. He concluded based upon his operative findings that Ms. Martinez had arthritis and cartilage damage in the lateral compartment of her right knee. After suturing the incisions for the arthroscopic insertion, he injected her knee with corticosteroid.

99. On April 25, 2016, Dr. Chambers recorded in his post-operative visit report that Ms. Martinez still has pain and swelling of the knee. Dr. Chambers stated that she "*can only stand or walk about 10-15 minutes*." He noted significant abnormality in her range of motion and started her on post-operative physical therapy.

100. On May 2, 2016, Ms. Martinez started physical therapy on her right knee. She had another session on May 4, 2016 and again on May 9, 2016.

101. On May 5, 2016, John Sedgh, M.D., board-certified in internal medicine, examined Ms. Martinez in-person. Dr. Sedgh was retained by the SSA as part of its review of Ms. Martinez's claim to the SSA for government SSDI benefits.

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Dr. Sedgh conducted a complete "internal medical assessment of alleged disability." This included his in-person physical exam of Ms. Martinez, formal objective testing, "observations of the claimant's spontaneous actions," and interviewing Ms. Martinez about her present complaints and medical history. Dr. Sedgh diagnosed Ms. Martinez with: (1) Right knee arthritis; and (2) Right shoulder arthritis. He specifically documented that his diagnosis was based on his objective testing and stated that, "Objectively, there is a limited range of motion of the right knee and both shoulders. The gait is moderately antalgic." Despite that Dr. Sedgh was retained by an independent government agency, the SSA, and has no allegiance to Ms. Martinez, he concluded that Ms. Martinez has the following functional limits, among others: (1) "The claimant can stand and walk for two hours out of an eight-hour workday;" (2) "It is my opinion that the claimant does need a cane as an assistive device for long distances." Thus, in Dr. Sedgh's professional medical opinion, Ms. Martinez is physically disabled from performing any job that requires these types of activities, and her position requires standing and walking for far longer, typically more than six hours per day.

102. On May 9, 2016, Dr. Chambers recorded in his post-operative visit report that Ms. Martinez "continues to have pain, sometimes bad" and despite the physical therapy, "it hurts to bend her knee" requiring her to take pain medication. He performed objective tests on her knee and shoulder which showed continued pain in both and abnormal range of motion in her knee. Ms. Martinez also reported continuing pain in her right shoulder and that she would like physical therapy for her shoulder too. Dr. Chambers prescribed continued physical therapy on her knee and initiated therapy for her shoulder for three weeks, twice per week.

103. On May 11, 2016, during one of Thompson's weekly psychotherapy sessions with Ms. Martinez for severe, disabling depression, anxiety, panic attacks

and resulting insomnia, he documented in his progress notes that Ms. Martinez is "becoming more isolated at home" and experiencing fear different than her regular panic attacks.

104. On May 13, 16, 20 and 23, 2016, Ms. Martinez continued physical therapy on her right knee.

105. On May 18, 2016, Dr. Thomas, Ms. Martinez's chiropractor that has treated her since 2003, examined her for right knee pain, right shoulder pain and low back pain. She complained of those ongoing conditions, rated her right shoulder pain at eight-to-nine out of ten with ten representing "unbearable pain" and stated that she has lost strength in her right hand to the point where she drops things. Dr. Thomas performed objective tests and physically examined her right knee, right shoulder and lumbar spine. He conducted range of motion tests on her knee and concluded the range was "decreased approximately 25% in flexion and 5% in extension." Additionally, palpation tests confirmed palpatory tenderness of +2 in the medial and lateral joint line and in the patellar tendon. His exam revealed a "post-op scar of the right knee." Range of motion in Ms. Martinez's right shoulder likewise was abnormal, "approximately 50% of normal." Objective Tinel's test was positive in the right wrist for median nerve dysfunction. Palpation tests showed +1 in the right shoulder/subscapularis. Resisted range of motion caused pain in Ms. Martinez's right bicep. The empty can test was positive for pain in her right shoulder as well. Range of motion in the lumbar spine was decreased by 20% in flexion and 5% for all other motions. A straight leg test was positive for pain on the right. She had palpatory tenderness of +2 bilaterally in her sacroiliac joints and at the L3-L5 level of her lumbar spine.

106. On May 25, 2016, Dr. Thomas wrote a detailed report of his opinions

about Ms. Martinez's physical functional restrictions and limitations due to her right knee, right shoulder and low back pain/conditions. He based his opinions on his May 18, 2016 physical exam of Ms. Martinez, his extensive treatment history with the patient since 2003 (including nine recent exams of her since the onset of her knee and shoulder pain in February 2015), objective MRI and x-ray imaging and testing, his discussions with the patient, and his review of the patient's job descriptions at Chase Bank as a Business Relationship Manager (which job duties he outlined in his report as including walking for substantial portions of her workday while at client meetings and also driving to get to the meetings).

107. Dr. Thomas reiterated in his May 25, 2016 report that Ms. Martinez had been his ongoing patient since 2003 but has recently treated with him for knee pain, shoulder pain and low back pain, as well as sciatica (in the past). He noted she had an MRI in 2005 that was positive for multiple disc bulges and degenerative disc disease. He further noted that he had referred her for other MRI evaluations noted above (in March and July 2015) on her right knee and right shoulder due to her continuing complaints of pain in those areas. Dr. Thomas concluded that the MRIs showed that her right "knee was positive for a torn medial meniscus" and her right "shoulder was positive for degenerative changes." More specifically, upon reviewing Ms. Martinez's March 29, 2015 MRI films of her right knee, he determined they were abnormal and concluded the films pictured a medial meniscus tear, chondromalacia patella, a joint effusion and potentially bursitis of the right knee. Dr. Thomas noted that the patient recently had surgery to repair the meniscus tear on April 15, 2016. Dr. Thomas diagnosed Ms. Martinez currently with: (1) Post-op medial meniscus surgery, right knee; (2) Shoulder tendonitis, bilaterally; (3) Lumbar enthesopathy; and (4) Brachial neuritis. He concluded Ms. Martinez needs further treatment for her knee and shoulder and possibly a candidate for shoulder surgery. But he would like her to consult with an orthopedic surgeon to further

evaluate her shoulder issues and lumbar spine issues.

108. *Dr. Thomas concluded in his May 25, 2016 report that Ms. Martinez was and is disabled from performing her occupational duties continuously* ***since February 2015 through the present*** *due to her physical ailments, i.e. her knee, shoulder and low back. He further concluded her physical disability would continue for at least an additional three to six months and possibly permanently*:

> In my professional opinion, at the very least, she is temporarily totally disabled and has been at all times since February 2015 through the present [May 25, 2016].
>
> ****
>
> With regard to her disability status, based on the job description I have been given, it is my professional opinion that she is unable to do her job description at this time and has been unable to do so since February 2015. I believe she is temporarily totally disabled. I would recommend a re-evaluation in 3 to 6 months to determine whether she continues to be unable to perform her job duties. The patient may be permanently disabled, however; there remain several unresolved issues that require further evaluation and possible treatment for those issues.

He concluded that she had the following walking, standing and sitting/driving functional restrictions and limitations due to her right knee, right shoulder and low back conditions and, therefore, was unable to perform her job duties:

> Due to her lumbar spine and knee issues, she would be able to *stand and/or walk for approximately 2 hours before she would need a short break, likely 10-20 minutes*, in my professional opinion. At the very

> most, I would anticipate that she could stand and/or walk combined a maximum of 3 to 4 hours a day. In other words, it is my opinion that *she can stand, walk, or do a combination of those two activities for at most 3 to 4 hours a day total between both activities*. To clarify, that is not saying that she could stand for 3 to 4 hours and also walk for 3 to 4 hours in the same day, it is 3 to 4 hours total. Her job requires driving as well. She would *not be able to sit more than 20 to 30 minutes without the necessity of altering her position or taking a break*, in my professional opinion, and *can sit a maximum of 3 to 4 hours a day*. (Emphasis added).

109. On May 19, 2016, Rama Nadella, M.D., a board-certified psychiatrist acting on the SSA's behalf in connection with Ms. Martinez's SSDI government benefits claim, independently examined her. At the exam, Dr. Nadella interviewed Ms. Martinez, obtained her job duties, observed her, performed a complete mental status examination including numerous objective psychiatric tests (such as "memory," "concentration and calculation," "serial threes," "proverbs," "similarities and differences," "insight and judgment"), and took an extensive medical/psychiatric, family, environmental and social history. ***Dr. Nadella concluded, after conducting the complete psychiatric exam, that Ms. Martinez is psychiatrically disabled from performing any type of work, including that she has the following functional limits***: (1) "The claimant is not able to perform simple and repetitive tasks. She is not [able] to perform detailed and complex tasks;" (2) "She is not able to maintain regular attendance in a work setting;" (3) "She is markedly limited in performing work activities on a consistent basis;" (4) "The claimant is moderately limited in performing work activities without additional supervision;" (5) "She is markedly limited in completing a normal workday without interruption;" (6) "She is moderately limited in accepting instructions from supervisors;" (7) "Her

ability to interact with the public, coworkers and supervisor is moderately limited;" and (8) "The claimant is moderately limited in dealing with the usual stressors encountered in competitive work."

110. Dr. Nadella diagnosed Ms. Martinez with: (1) Major depression; (2) Panic disorder; and (3) Adjustment disorder with anxiety and depression due to work stress. She concluded Ms. Martinez **has a GAF score of 50**, meaning she has *severe symptoms of mental illness and that her ability to function at work is severely impaired. See http://www.albany.edu/counseling_center/docs/GAF.pdf* (A GAF score between 41 and 50 means she has "serious symptoms (e.g.. suicidal ideation, severe obsessional rituals, frequent shoplifting) OR any serious impairment in social, occupational, or school functioning (e.g., no friends, unable to keep a job)."

111. On June 13, 2016, Dr. Afshar wrote a letter responding to Prudential and its psychiatrist consultant, Kevin Hayes, M.D. Dr. Afshar explained that Dr. Hayes had misinterpreted her "stable" comment in her March 2, 2015 progress notes. Dr. Afshar clarified that by "stable" she absolutely did not mean that Ms. Martinez was ready to resume work as of March 2, 2015. To the contrary, Dr. Afshar stated:

> I am the treating psychiatrist for Dora Martinez since her first visit on November 17, 2014. I am responding to Prudential's interpretation of my comment on the patient being "stable" on March 2, 2015. Stable is a comment regarding a patient's response to psychiatric medications I prescribe. When a patient is unstable there is a side effect or some intolerance of a medication. If unstable, a patient would require a change of medication.

It seems the Prudential's psychiatrist interpreted "stable" to mean permanent and stationary, therefore Dora was ready to resume work. This was certainly not the intent of any use of the word "stable". (Emphasis added).

112. Thus, it is Dr. Afshar's opinion that Ms. Martinez could not perform her job duties in March 2015, contrary to how Dr. Hayes's interpreted her progress notes. Dr. Afshar also noted in her report that Ms. Martinez was put on disability by her primary care physician, and her focus has been "resolving her psychological disorder through psychiatric medications" and also by referring her to weekly psychotherapy.

113. On June 15, 2016, during one of his weekly psychotherapy sessions for depression and anxiety which he had been doing since September 2015, Thompson documented in his progress notes: "patient fearful to go outside at night to lock or move a car. She requires a family member escort her outside. She doesn't like to go out alone." He further noted that Ms. Martinez reports a burning pain four inches below her knee but that her knee is "slowly improving."

114. On June 20, 2016, Dr. Patel concluded in her professional opinion as a board-certified internist, after having treated Ms. Martinez for twenty-five years, most recently since September 9, 2014 for anxiety and depression and since February 13, 2015 for knee pain, and after reading her job description as a Business Relationship Manager at Chase Bank, *that she was and still is unable to perform her job duties because of anxiety, depression and right knee pain* requiring surgery. Dr. Patel specifically concluded as follows:

In regards to our patient, Ms. Martinez, it is my opinion after reading

> her job description that she is unable to perform her duties given her most recent medical conditions. Most recently, Dora had Right Knee surgery by Dr. Chambers on 4/15/2016. On her office visits, she always complained of anxiety and depression which I concur with her referring physicians. Since she still has a problem with her knee, depression, and anxiety, I do not recommend her to start work in the near future.

Dr. Patel's letter confirms she still holds the opinion that Ms. Martinez was disabled in 2016, just as she also opined in 2014 and 2015 when she treated her for anxiety and depression.

115. On June 21, 2016, the SSA approved Ms. Martinez's claim for SSDI benefits after having two separate health care providers, Drs. Nadella and Sedgh, examine her mental (depression, anxiety, panic attacks) and physical symptoms (shoulder and knee), *i.e.* they conducted an in-person independent psychiatric examination and an in-person medical examination. **Based upon these independent exam reports, the SSA awarded Ms. Martinez SSDI benefits and "found that [Ms. Martinez] became disabled under our rules on September 10, 2014." The SSDI's retroactive, ongoing Notice of Award letter *shows an independent entity considers Ms. Martinez disabled from working from September 10, 2014 through the present*.**

116. On June 22, 2016, therapist Thompson wrote a letter again certifying that Ms. Martinez is mentally disabled from working. He reiterated many of the same opinions he had expressed in his September 23, 2015 and December 1, 2015 reports. Therapist Thompson reported that he has been treating Ms. Martinez for weekly psychotherapy ever since she was referred to him by Dr. Afshar, a psychiatrist also with Pacific Coast Healthsystems, *i.e.* since September 2, 2015.

Based on his numerous, weekly in-person exams and therapy sessions, he concluded again that Ms. Martinez *was still disabled from performing her occupation at Chase Bank* ***as of June 2016 and always has been at least since September 2015 when he started treating her***, noting that she is "in no condition to resume her position at the bank." He stated, "Clearly, Ms. Martinez has been disabled from 9/2/15 to present [6/22/16]." Thompson further concluded that Ms. Martinez had the following functional limits and symptoms: recurring panic attacks, activities of daily living deteriorated as she would not shower for several days, sad, frequently tearful and upset, loss of interest in previously enjoyed interests, feelings of hopelessness and helplessness, diminished ability to concentrate, insomnia, fearful of making mistakes that would lead to losses to the bank or to customer accounts, and loss of confidence in working with numbers and balances. Thompson reiterated that he had diagnosed her with "recurring Major Depression that at times has had psychotic features" such as feeling like an intruder could possibly assault her.

117. On July 15, 2016, Ms. Martinez, through her counsel, appealed Prudential's denial of her disability benefits. Her lawyers pointed out the flaws in Prudential's benefits decision, both its April 2015 and January 2016 denial letters. For example, they summarized the overwhelming medical evidence that unequivocally established Ms. Martinez was and is continuously disabled from September 2014 through the present, contrary to what Prudential had concluded. Furthermore, they explained that Prudential: (1) failed to determine Ms. Martinez's occupational duties, a critical part of any disability analysis; (2) improperly relied on the "paper reviews" of two biased psychiatrist consultants, neither of whom examined or spoke with Ms. Martinez, and whose poorly reasoned opinions directly contradicted each other; (3) improperly required Ms. Martinez to meet a heightened standard of "disability" not contained in the group policy; and (4) ignored the contrary decision from an independent entity (and its psychologist consultant),

Chase Bank, finding Ms. Martinez disabled from performing the duties of her occupation under the terms of its STD plan.

118. Ms. Martinez's lawyers submitted with the appeal a large volume of supporting evidence, including her updated medical/psychological records discussed in this Complaint, several letters from her attending physicians and mental health care providers (certifying that she was and is disabled from performing her occupational duties and refuting the inaccurate conclusions of Prudential's medical consultants), Ms. Martinez's official job description, and the award of disability benefits from the SSA finding Ms. Martinez totally disabled from performing any type of work including her own due to her depression, anxiety and knee/orthopedic problems. Ms. Martinez's lawyers highlighted the SSA's conclusion that she was disabled and warned Prudential that Ninth Circuit case law is clear that it cannot disregard the SSA's finding but must explain why it disagrees to the extent it does.

119. Counsel also requested in the appeal letter that any communications between Prudential's consulting physicians and Ms. Martinez's treating physicians/ therapists be in writing, with at least two weeks' notice and a copy sent to counsel, so that Ms. Martinez and her physicians would have a fair opportunity to respond to questions from Prudential's medical consultants. The appeal letter made this request in bold so that Prudential could not miss it. Prudential disregarded the request and again had its medical consultants place "cold calls" to Ms. Martinez's attending physicians in the midst of their busy medical practices without even notifying counsel, not allowing them a reasonable opportunity to respond. Ms. Martinez's counsel even offered her for an in-person "independent psychiatric and/or medical examination, functional capacity examination or other examination" by Prudential's consultants so that all their questions could be answered and they could verify her disability. But Prudential ignored the offer, again electing for less credible "paper

reviews" of her medical records.

120. On September 28, 2016 and October 21, 2016, Ms. Martinez's counsel sent letters to Prudential enclosing additional support for her appeal. The letters enclosed the two IME reports prepared by the doctors retained by the SSA to evaluate Ms. Martinez's claim for SSDI benefits, Drs. Nadella and Sedgh. As discussed above, the results of both in-person examinations were consistent with Ms. Martinez's treating physicians/mental health professionals finding that Ms. Martinez had functional limits that prevented her from performing her own occupation and, in fact, any gainful occupation (and in fact even with Prudential's own orthopedic consultant, Dr. Trotter).

121. On October 13, 2016, Prudential referred the matter back to Drs. Chavez and Trotter to assess Ms. Martinez's functional abilities from a psychiatric and orthopedic standpoint, respectively. Prudential provided its consultants with updated medical records from Ms. Martinez's attending providers and the in-person IME exam reports from the SSA's psychiatrist and internist. Prudential again requested file reviews from its consultants instead of in-person exams, despite that Ms. Martinez offered herself for an IME through her counsel in her June 2016 appeal.

122. On October 17, 2016, Dr. Chavez spoke with Ms. Martinez's treating primary care physician, Dr. Patel. Dr. Patel reported that he diagnosed Ms. Martinez with anxiety and depression, that she has poor concentration and crying spells, and that he referred her to a psychiatrist and therapist whom have consistently treated her with anti-depressants and therapy. Dr. Chavez did not even try to speak with Ms. Martinez's long-standing treating psychiatrist, Dr. Afshar, the SSA psychiatrist that performed an in-person psychiatric exam and concluded she

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was disabled, Dr. Nadella, or any of Ms. Martinez's other treating mental health care professionals such as her psychotherapist, Thompson. Those were the obvious professionals that Dr. Chavez should have contacted, but he did not because Prudential and its "paper reviewing" consultant did not want to provide Ms. Martinez with a full and fair review of her claim as required by ERISA. They did not want the opportunity to learn the reasons for their opinions that Ms. Martinez was and is disabled from a psychiatric standpoint. Had Prudential provided notice to Ms. Martinez's counsel (that Dr. Chavez would be contacting Dr. Patel), as counsel expressly asked it to do in their July 2016 appeal letter, counsel would have facilitated a meeting with the appropriate attending mental health providers that had the requisite specialty instead of a PCP.[14] As expected, during her conversation with Dr. Chavez, Dr. Patel deferred to his patient's treating psychiatrist as the most qualified physician to determine whether Ms. Martinez is disabled from depression and anxiety.

123. On October 20, 2016, Dr. Chavez completed a peer review report of his opinions based upon his medical record review and phone conversation with Dr. Patel, and he sent it to Prudential. He advised that his original opinion had not changed based upon the additional medical records and in-person exam report of the SSA's psychiatrist, Dr. Nadella. He concluded, just like before, that Ms. Martinez had no medically necessary work restrictions from a psychiatric standpoint. His analysis remained the same, that Ms. Martinez had not displayed "psychosis," a "severe mental illness," risk of self-harm or confinement to a mental hospital, and, that he would have expected to see evidence of this if Ms. Martinez was truly psychiatrically impaired from performing her job duties. Dr. Chavez disagreed with Ms. Martinez's treating mental health care providers and Dr. Nadella (each of whom

[14] Similarly, Dr. Trotter contacted Ms. Martinez's treating chiropractor without Prudential notifying her counsel as requested in counsel's appeal letter.

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performed in-person mental health exams and concluded she was disabled due to depression, anxiety and panic attacks), on the grounds that she had not met this arbitrary threshold for disability not contained in Prudential's group policy.

124. On November 1, 2016, after reviewing Ms. Martinez's updated medical records, Dr. Trotter wrote a peer review report of his opinions and sent it to Prudential. His opinion did not change from that given to Prudential in December 2015. He continued to believe that Ms. Martinez, due to her right knee problem, had the following medically necessary functional restrictions and limitations from working as of the date of his November 2016 report, among others: "no standing and/or walking up to 45 minutes at a time and no more than 2 hours combined in an 8 hour day." Dr. Trotter's opinions about Ms. Martinez's knee functional limits are identical to what the independent SSA physician found, Dr. Sedgh.[15]

125. On November 14, 2016, Prudential denied Ms. Martinez's July 2016 request for reconsideration of the appeal denial and reaffirmed its claim denial, after acknowledging that she had anxiety, depression and serious orthopedic problems including to her right knee. The logic of its decision mirrored that of its January 2016 appeal denial. As before, it reasoned there is no evidence that Ms. Martinez had medically necessary work limits from a psychiatric perspective, from September 2014 onward (despite her anxiety and depression). And, by the time that she became disabled due to her knee and other orthopedic injuries in early 2015, she was no longer covered by the group policy because she was not actively working at Chase Bank since September 2014.

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[15] Prudential sloppily asked Dr. Trotter to review and opine on Dr. Nadella's report (the SSA's psychiatrist consultant) but not Dr. Sedgh's report, the SSA's medical doctor that performed an in-person exam of Ms. Martinez's knee and other orthopedic complaints.

> Although she would have restrictions and limitations that would preclude her from working due to her various orthopedic complaints, these conditions were not supported until after she went out of work and she fell out of a covered class. As noted in the policy, coverage ends when an employee is no longer in active employment. Since her September 9, 2014 claim of disability was not covered under the plan, she fell out of coverage.

Thus, the critical part of Prudential's analysis, upon which the merits of its benefits decision stands or falls, is its conclusion that Ms. Martinez did not have psychiatric work limits from September 2014 to early 2015. Because, if she did, she was still covered under the Policy when her admittedly disabling knee condition commenced.

126. Prudential primarily relied upon the opinions of its psychiatrist and orthopedic file reviewers, Drs. Chavez and Trotter, to deny the request for reconsideration of the appeal denial, quoting extensively from their updated medical record peer review reports before concluding Ms. Martinez was not entitled to disability benefits. Prudential briefly and without much explanation mentioned the SSA's award of disability benefits but found it did not apply. It stated that its "paper reviewing" consultant, Dr. Chavez, disagreed with the SSA's psychiatrist's conclusion (that Ms. Martinez was mentally disabled from working) because the medical records did not document "psychosis," "risk of self-harm," "severe mental illness," confinement to a mental hospital or treatment in a "psychiatric intensive outpatient program." Per Prudential and its consultant Dr. Chavez, while the medical records documented that Ms. Martinez had anxiety disorder and depressive disorder, they did not evidence "a severe mental illness which would be expected to impair function."

127. As with its earlier denial letters, Prudential failed to analyze Ms. Martinez's job duties, devoting only one sentence to them in its eight-page letter: "Ms. Martinez's occupation as a Business Relationship manager is a light occupation which includes occasional lifting up to 20 pounds, frequent but intermittent standing and walking, frequent reaching and handling and occasional fingering." Prudential did not discuss the cognitive, mental focus/concentration or relationship building aspects of her occupation, despite her claimed mental disability.

128. Prudential's benefits decision was blatantly incorrect, including its April 2015, January 2016 and November 2016 denial letters. Despite the overwhelming medical evidence summarized above establishing Ms. Martinez was and is disabled from September 2014 to the present due to severe depression, anxiety and panic attacks, and from February 2015 to the present due to a right knee meniscus tear requiring surgery and other physical problems with her right shoulder, foot and low back, Prudential failed to approve Ms. Martinez's claim for LTD benefits. Instead of giving proper credence to the medical records of the physicians and mental health care providers who treated and examined Ms. Martinez, Prudential relied on the opinion of an in-house psychiatrist, Kevin Hayes, M.D., and an outside psychiatrist consultant, Eric Chavez, M.D., who only conducted "paper reviews" of Ms. Martinez's medical records. The conclusions based on those reviews were erroneous and did not provide ample support for Prudential's claim decision.

129. There are multiple problems with the conclusions of Prudential's consultants, Drs. Hayes and Chavez. First, Dr. Hayes is Prudential's paid employee and thus inclined to favor his employer, and Dr. Chavez is part of a peer review organization, MES, regularly hired by Prudential that caters to the insurance

industry. *See Garrison v. Aetna Life Ins. Co.*, 558 F. Supp. 2d 995, 1002 fn. 6 (C.D. Cal. 2008) (the court noted the high number of medical reviews performed by MES for Prudential and other insurance companies and that it is in the business of performing medical reviews for insurance companies); and *Cathleen Myers v. The Prudential Ins. Co. of America*, 2009 WL 4500252, No. 1:089-cv-22 (Mar. 27, 2009 E.D. Cal.) (In 2006, MES performed 389 reviews for Prudential and Prudential paid it $267,441.25, and in 2007 MES performed 465 reviews and was paid $301,722.50 by Prudential). These consultants are financially reliant upon Prudential and the insurance industry in general, and have been used by them repeatedly to give disability opinions. A court will review Prudential's claim denial with skepticism since it relied upon its financially conflicted, well compensated medical consultants. *See Demer v. IBM Corporation LTD Plan*, 2016 WL 4488006 (9th Cir. Aug. 26, 2016) (a district court's review of an insurance company's benefits decision, when it is based upon the opinion of a medical consultant used often by the insurer, should be tempered by skepticism because of the financial incentive that the consultant has to pander to the insurer's interests); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 832, 155 L.Ed.2d 1034 (2003) ("Nor do we question the [Ninth Circuit] Court of Appeals' concern that physicians repeatedly retained by benefits plans may have an 'incentive to make a finding of not disabled in order to save their employers money and to preserve their own consulting arrangements.'"); and *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1011 (9th Cir. 2004) (noting that a fact-finder could reasonably conclude that an expert has lost his independence when that expert has represented an insurance company on a continual basis).

130. Prudential's consultants also failed to examine Ms. Martinez, failed to speak with her about her psychiatric condition, and failed to speak with her attending mental health care professionals, each of whom have been regularly treating her for months to years and consequently have gained great insight into her

mental illness and functional limits.[16] Instead, they simply reviewed her medical records. Therefore, their opinions based purely on a cold file review carry far less weight.

131. Third, Dr. Hayes's conclusion rests entirely on a false assumption – his erroneous interpretation of the March 2, 2015 progress note of Parvin Afshar, M.D., Ms. Martinez's board-certified treating psychiatrist. Without contacting Dr. Afshar to determine what she meant, and despite that her handwritten progress note is in cursive, difficult to read if not illegible and includes only a brief ambiguous comment using the word "stable," Dr. Hayes overreached. He broadly interpreted "stable" to mean that Ms. Martinez could return to work and that she no longer had disabling psychiatric symptoms of depression, anxiety and panic attacks because Dr. Afshar (he thought) said she was "stable." But Dr. Afshar's cryptic March 2, 2015 progress note says nothing of the sort. It appears to state in full, "P/ 6 stable – no S/H I no A/VH sleep & app WNL P refill meds XTrw." Dr. Hayes ran with that abbreviated note and liberally interpreted "stable" to mean that, in Dr. Afshar's opinion, the patient "was stable with resolution of all symptoms by 3/2/15" and that the "claimant stabilized by 3/2/15 with no ongoing [restrictions/limitations] as of that date."

132. Dr. Hayes flatly misinterpreted Dr. Afshar's cryptic comment. Dr. Afshar has since explained her illegible March 2, 2015 progress note in a June 13, 2016 letter enclosed with Ms. Martinez's July 2016 appeal. She clarified that she meant that Ms. Martinez's medications were "stable," that she was not experiencing

[16] Both Drs. Hayes and Chavez spoke with Dr. Patel, Ms. Martinez's primary care physician. While Dr. Patel treated Ms. Martinez for anxiety and depression, she is not a specialist and not the appropriate treater that they should have consulted about Ms. Martinez's mental condition. Dr. Patel referred her patient to specialists that would know more about her mental health. Indeed, Ms. Martinez was also regularly treated by a psychiatrist Dr. Afshar and psychotherapists Thompson, Isom and Banerjee.

side effects nor intolerant to the medications requiring a change of medication. But that she never intended to imply that Ms. Martinez was ready to resume work as of March 2, 2015 by writing "stable." Dr. Afshar further explained that Dr. Hayes had misinterpreted her "stable" progress note in that regard. Dr. Afshar continued to treat Ms. Martinez on a regular basis each and every month after March 2, 2015 through the present for severe depression, anxiety and panic attacks. Obviously, there would be no need for the continued treatment if her disabling symptoms had resolved on March 2, 2015. Because Dr. Hayes's opinion rests entirely on his wrong interpretation of Dr. Afshar's medical record, it lacks proper foundation and thus carries no weight.

133. Dr. Hayes (and Prudential) relied upon a purported April 8, 2015 telephone conversation he had with Ms. Martinez's attending primary care physician, Dr. Patel, *which conversation Dr. Hayes mischaracterized*. This second inaccurate assumption further undermines Dr. Hayes's conclusion. Dr. Patel reportedly stated that she agreed with Dr. Hayes that her patient could return to work as of March 2, 2015 because she was no longer experiencing disabling depression, anxiety and panic attack symptoms as of that date, and that Dr. Patel's return to work date of May 25, 2015 was purely an estimate for which Dr. Patel had no specific reason. Dr. Hayes grossly distorted what was discussed during that telephone conversation. Indeed, Dr. Hayes asked Dr. Patel to sign a letter agreeing that he had accurately characterized their phone conversation, but Dr. Patel refused. There is no evidence in the administrative record that Dr. Patel ever signed that letter or agreed that it accurately reflected their phone conversation.

134. Equally important, the claim file confirms the opposite. It shows that Dr. Patel has repeatedly certified Ms. Martinez's disability from returning to work due to major depression and anxiety well past March 2, 2015 and, most recently, in

her letter dated June 20, 2016 where she concluded that her patient is still unable to return to work due to anxiety and depression as of June 2016. Obviously, Dr. Patel never held the opinion that Ms. Martinez could return to work as of March 2015 since she has certified her disability continuously from September 2014 through June 2016.

135. Even Dr. Hayes's version of the April 8, 2015 phone conversation concedes that he told Dr. Patel that Ms. Martinez's treating psychiatrist, Dr. Afshar, had determined that she was "stable" and thus could return to work as of March 2, 2015, and that Dr. Patel said she would defer to the opinions of Ms. Martinez's attending mental health specialists like Dr. Afshar. For the reasons discussed above, that was not Dr. Afshar's opinion. Thus, at worst, the phone conversation, which has never been confirmed by Dr. Patel as accurate, reflects that Dr. Hayes gave Dr. Patel wrong information about Dr. Afshar's opinion and, therefore, anything Dr. Patel said during that conversation did not express her true opinion about her patient's mental health condition. For these reasons, Prudential's reliance on Dr. Hayes's opinion and purported conversation with Dr. Patel was improper.

136. Additionally, Prudential's reliance on Dr. Chavez's opinion was similarly improper. Dr. Chavez's and Dr. Hayes's respective opinions directly contradict each other. Prudential's own psychiatrists could not even agree. Dr. Hayes concluded Ms. Martinez was unable to work due to mental health restrictions from September 10, 2014 through March 2, 2015, at which time her symptoms stabilized such that she could return to work. But Dr. Chavez concluded Ms. Martinez has always been able to work, including from September 10, 2014 through the present, because her depression and anxiety have always been mild enough such that they do not interfere with her job duties (even though Dr. Chavez was never given her job duties because Prudential itself did not know them). Because

Prudential's own psychiatrists contradict each other, Prudential should not have relied upon either opinion, especially because every mental health care professional that has actually examined Ms. Martinez, unlike Drs. Hayes and Chavez, have concluded that she cannot work due to severe anxiety, depression and panic attacks.

137. While Dr. Chavez focuses on the lack of confinement to a mental hospital, psychosis and risk of self-harm as evidence supporting his conclusion that Ms. Martinez is not mentally disabled from performing her occupation, as noted below, that is not an actual requirement of the Policy but a nonsensical, arbitrary threshold.

138. Dr. Chavez's statement that Ms. Martinez "stopped going to individual therapy from February 2015 until September 2015" is inconsequential and factually inaccurate. Ms. Martinez saw her psychiatrist, Dr. Afshar, each and every month during that entire time frame and has always treated with a psychotherapist on a weekly basis, except for a brief time from March 10, 2015 to September 2, 2015 when she was transitioning her care from one therapist to another in part because the former, Dr. Banerjee, was very busy and had to cancel multiple appointments. Dr. Banerjee confirmed that Ms. Martinez remained disabled as of her last visit on March 10.

139. Dr. Chavez similarly misinterpreted and relied upon the various "stable" comments in Dr. Afshar's progress notes just like Dr. Hayes, thus undermining one of the key bases for his opinion.

140. Dr. Chavez disregarded the patient's subjective complaints that she was unable to function at work due to depression, anxiety and panic attacks, and numerous attending physicians, therapists and a SSA psychiatrist that each certified

her mental disability from working. He disagreed with their opinions based upon nothing more than a "cold paper review" of the medical records. While Dr. Chavez offered an opinion regarding Ms. Martinez's restrictions and limitations that differed from those offered by her treating mental health professionals, he did not speak with them nor her, nor did he independently examine Ms. Martinez. Thus, his conclusion that Ms. Martinez is not disabled is entirely based on the medical records of physicians who do believe she is disabled. Further, while Dr. Chavez's conclusions differed from that of Ms. Martinez's treaters, he did not reach out to discuss these differences of opinions. Such a step was very important, especially considering the vast medical evidence supporting Ms. Martinez's restrictions and limitations. The fact that Dr. Chavez failed to contact Ms. Martinez's treaters to discuss the apparent discrepancies in the conclusions regarding her restrictions and limitations is evidence that Dr. Chavez (and thus Prudential) did not give their opinions proper weight.

141. Finally, Prudential's decision to deny Ms. Martinez's claim based on the "paper reviews" of Drs. Hayes and Chavez was improper, as such a course of action has been criticized by the Ninth Circuit. *Montour v. Hartford Life & Accident*, 588 F.3d 623, 630 (9th Cir. 2009) (citing *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008)). An administrator may not "arbitrarily refuse to credit a claimant's reliable evidence, including the opinions of treating physicians." *Id.*; *see also Lin v. Metropolitan Life Insurance Company*, 2016 WL 4373859, *6, *9 (N.D. Cal. Aug. 16, 2016) (citing *Montour* at 634) (finding plaintiff disabled under de novo review reasoning, "the Court finds it significant that MetLife terminated Plaintiff's benefits without actually examining him. The Ninth Circuit has recognized that an insurer's decision to conduct 'a 'pure paper' review. . ., that is, to hire doctors to review [the claimaint]'s files rather than to conduct an in-person medical evaluation of him' may raise 'questions about the thoroughness and

accuracy of the benefits determination.' "); *Michaels v. Equitable Life Assur. Soc.*, 305 F. App'x 896, 906-07 (3d Cir. 2009) (questioning administrator's choice to give determining weight to the conclusions of experts' paper review reports over the conclusions of claimant's treating physicians); *Moskalski v. Bayer Corp.*, 2008 WL 2096892, at *9 (W.D. Pa. 2008) ("[T]he selective, self-serving use of medical information is evidence of arbitrary and capricious conduct.").

142. Indeed, other reported decisions reflect that courts are troubled when, as Prudential did here, an administrator denies a claim by relying on the paper-review reports of consultants that oppose the conclusions of treating physicians.[17]

143. **No fewer than six treating doctors/therapists and two completely independent SSA doctors, each of whom actually examined Ms. Martinez in-person numerous times during the relevant time period since September 2014, have concluded that she is disabled from performing her occupational duties because of severe depression, anxiety, panic attacks, insomnia, a right knee meniscus tear requiring surgery, shoulder pain and/or low back pain**. As

[17] *See e.g., Schwarzwaelder v. Merrill Lynch & Co., Inc.*, 606 F. Supp. 2d. 546, 559 (W.D. Pa. 2009); *Elms v. Aetna Ins. Co. of Am.*, 2008 WL 4444269, at *15 (E.D. Pa. 2008) (It is "important to note that no doctor who has actually treated [plaintiff] or examined her in person, as opposed to performing a 'file review' has found her to be capable . . . of performing work-related tasks."); *Winkler v. Metropolitan Life Ins. Co.*, 170 F. App'x 167 (2d Cir. 2006) (vacating denial as arbitrary where it was based "entirely on the opinions of three independent consultants who never personally examined [plaintiff], while discounting the opinions" of the treating physicians); *Glenn v. MetLife*, 461 F.3d 660, 671 (6th Cir. 2006), aff'd by *Metropolitan Life Ins. Co., supra*, 554 U.S. 105 (finding it "perplexing" that the plan administrator disregarded the opinion of the "only physician to have personally treated or observed" the claimant); *Kinser v. Plans Admin. Comm. of Citigroup, Inc.*, 488 F. Supp. 2d 1369, 1382-383 (M.D. Ga. 2007) (concluding it was unreasonable for the plan administrator to ignore the treating physician's "clearly stated and supported opinion" and rely instead on "a cold record file-review by a non-examining" consultant); *Schramm v. CNA Fin. Corp. Insured Grp. Ben. Program*, 718 F. Supp. 2d 1151, 1164 (N.D. Cal. 2010) ("The Court likewise gives little weight to the opinions of Drs. Marion and Fuchs. Although they reviewed plaintiff's medical records, they did not examine her in person.").

alleged above, these include:

- Dr. Patel (PCP board-certified in internal medicine – treated her for twenty-five years including numerous times since September 2014);
- Dr. Afshar (board-certified psychiatrist – treated her twenty times from 2014 to 2016);
- Ms. Isom (licensed therapist – treated her weekly for five months during relevant time period);
- Dr. Banerjee (psychologist – treated her five times during relevant period);
- Mr. Thompson (licensed therapist – treated her twenty-nine times during relevant period);
- Dr. Thomas (chiropractor – treated her since 2003 including numerous times since September 2014);
- Dr. Nadella (board-certified psychiatrist acting on the SSA's behalf); and
- Dr. Sedgh (board-certified internist acting on the SSA's behalf).

144. The opinions of these heath care professionals, having examined the patient for years and having spoken with her in detail, carry far more weight than Prudential's "paper reviewers." *See Shannon Williams v. United Omaha*, 2013 WL 5519525, at *12 (N. D. Ala., Sept. 30, 2013) citing *Black & Decker v. Nord*, 538 U.S. 822, 832 (2003) (while a court is not required to give deference to the opinion of a treating physician, it is required to evaluate the weight of each doctor's opinion based on the extent of the patient treatment history). That court explained why the opinions of a treating physician is usually more credible:

> [D]irect contact with the patient over a period of time would provide a more thorough opportunity to assess her credibility regarding level of pain and the true pattern of her abilities. Therefore, in the instant case, the court will focus heavily on the opinions and treatment records of

Williams' treating physicians . . . .

145. As noted, Prudential's peer reviewers did not examine Ms. Martinez, though Prudential's Policy permitted it and her counsel even offered her up to Prudential for an IME. That raises additional questions about the credibility of their opinions and the accuracy of Prudential's benefits denial. *See Shaw v. AT&T*, 795 F.3d 538, 550 (6th Cir. 2015) ("the failure to conduct a physical examination, where the Plan document gave the plan administrator the right to do so, 'raise[s] questions about the thoroughness and accuracy of the benefits determination.' "); *McKenna v. Aetna Life Ins. Co.*, 620 F. App'x 445, 451–52 (6th Cir. 2015) (same rule applies for de novo review).

146. In sum, Prudential's claim decision relies on the opinions of two paid psychiatrists who conducted insufficient "paper reviews," failed to examine or even speak with Ms. Martinez, failed to give proper weight to the conclusions of her treating physicians, and which paper review opinions directly contradict each other and are not well reasoned. Prudential's "paper reviews" were flawed and contained conclusions not supported by Ms. Martinez's medical records. Accordingly, Prudential's benefit determination was incorrect and not the result of a proper, unbiased investigation. This is especially true in light of the fact that numerous attending physicians examined Ms. Martinez and concluded she is disabled. They were far better suited to render credible opinions than Prudential's "paper reviewers," having treated the patient for years.

147. Prudential's benefits decision is wrong for another reason. It improperly required Ms. Martinez to meet a heightened standard of "disability" not contained in the group policy or other Plan documents. It essentially attempted to rewrite the Policy to require a threshold level of evidence not in its express

provisions. For example, Prudential's January 6, 2016 and November 14, 2016 appeal denials (and Dr. Chavez's corresponding peer review reports upon which Prudential relied) each reason that because Ms. Martinez "was never hospitalized nor referred to a higher level of care such as a psychiatric intensive outpatient program," she was not disabled from performing her job duties (despite numerous mental health care professionals diagnosing her with debilitating depression, anxiety and panic attacks that prevented her from performing her job duties). Prudential and its psychiatrist consultant also reasoned that, absent evidence of "psychosis," "self-harm" and "severe" depression or mental illness, Ms. Martinez could not have a disabling mental illness that prevented her from working.

148. The Policy does not require any of that. The Policy definition of "disability" only requires that a claimant be "unable to perform the material and substantial duties of [her] regular occupation due to [her] sickness" and that Ms. Martinez is "under the regular care of a doctor." The definition that governs Ms. Martinez's claim provides that as long as her documented medical conditions prevent her from performing the essential duties of her regular occupation and she is under the care of a doctor, she is entitled to disability benefits. There is no requirement that the medical evidence she offers in support of her claim establish confinement to a hospital or intensive outpatient psychiatric care, nor psychosis, self-harm or "severe" depression.

149. In fact, in the scenario of hospital confinement the Policy explicitly requires Prudential to pay LTD benefits beyond the normal 24-month limit for mental illness disability claims. It states,

> Disabilities which, as determined by Prudential, are due in whole or part to ***mental illness*** have a limited pay period during your lifetime.

> The limited pay period for mental illness is 24 months during your lifetime. Prudential will continue to send you payments for disabilities due in whole or part to mental illness beyond the 24 month period if you meet one or both of these conditions: 1. If you are ***confined*** to a ***hospital or institution*** at the end of the 24 month period, Prudential will continue to send you payments during your confinement. If you are still disabled when you are discharged, Prudential will send you payments for a recovery period of up to 90 days. (Emphasis in original).

The Policy thus contemplates Prudential paying disability benefits for the first 24 months of a mental illness claim where the claimant is not confined to a mental hospital but is unable to perform the duties of her regular occupation, just as in Ms. Martinez's case. Prudential and its peer reviewer clearly required additional evidence, confinement to a mental hospital, not required by the Policy when denying Ms. Martinez's claim.

150. Similarly, the Policy expressly covers disabilities caused by a "mental illness," which the Policy broadly defines as any "psychiatric or psychological condition . . . includ[ing] but . . . not limited to . . . depression . . . anxiety . . . or other conditions." The Policy does not limit a covered mental illness to "severe" depression or "severe" mental illness, nor does it require evidence of psychosis,[18] self-harm or confinement in a mental hospital, contrary to what Prudential and its

[18] Despite that, Ms. Martinez's treating therapist, Mr. Thompson, reported that she did have episodes of psychosis. He reiterated that he had diagnosed her with "recurring Major Depression that at times has had psychotic features" such as feeling like an intruder could possibly assault her. He documented in his progress notes: patient has "paranoia while waiting out back at home. She fears attack when in shower." Prudential, in its November 2016 appeal denial, disingenuously attempts to downplay Mr. Thompson's opinion by concluding without any support that Ms. Martinez's behavior, while "suspicious" and expected by someone with anxiety, is not "psychotic."

psychiatrist consultant required.

151. Prudential's heightened requirement of disability is evidence that it did not provide Ms. Martinez with a full and fair review of her claim for benefits. Numerous courts have ruled that requiring the claimant to meet a standard of evidence not set forth in the policy is an abuse of whatever discretion is afforded the ERISA administrator and requires that the claim decision be overturned. For example, in *Saffle v. Sierra Pacific Power Co.*, 85 F.3d 455, 459-60 (9th Cir. 1996), the Ninth Circuit ruled that requiring a claimant to meet a standard that is not present in the Plan documents "effectively imposes a new requirement for coverage," but because "an administrator lacks discretion to rewrite the Plan," to do so is an abuse of discretion. In *Hagerty v. American Airlines Long Term Disability Plan*, 2010 U.S. Dist. LEXIS 91995 (N.D. Cal. Sept. 3, 2010), the court noted that "[n]umerous courts found it [in] error to require objective medical evidence of complaints that are inherently subjective in nature." *Id.* at *6 (citing *Montour v. Hartford Life & Acc. Ins. Co.*, 588 F.3d 623, 635 (9th Cir. 2009). The *Hagerty* court ruled that "requiring objective medical evidence of fatigue, when The Plan documents do not expressly require such proof, is a factor suggesting The Plan abused its discretion." *Id.* at *6. Similarly, here, Prudential requiring evidence of hospital confinement, psychosis, self-harm and "severe" mental illness or depression to establish mental disability suggests that it abused its discretion and failed to fairly review Ms. Martinez's claim.

152. Prudential's decision to ignore Ms. Martinez's diagnosed symptoms and subjective complaints of disabling depression, anxiety, panic attacks and insomnia, and demand that she provide evidence that she was confined to a mental hospital (had psychosis, "severe" depression and was at risk of self-harm) in support of her disability claim represents an improper attempt to rewrite the Policy in

Prudential's favor. Enforcing this unwarranted requirement strongly evidences that Prudential did not provide Ms. Martinez with a full and fair review of, and erroneously denied, her claim for benefits.

153. Another obvious problem in Prudential's benefits decision, both its initial denial and denials on appeal, is that it failed to account for a contrary decision from an independent entity finding Ms. Martinez disabled from working, her employer Chase Bank. That entity had a strong financial incentive to conclude Ms. Martinez was not disabled (but still found she was). Chase Bank handled Ms. Martinez's STD claim. Chase was the STD claim administrator and also responsible to self-fund any STD benefits it awarded its employees. Despite its financial incentive to conclude that Ms. Martinez was able to perform her material job duties, Chase Bank concluded the opposite, that Ms. Martinez was disabled from performing her own regular occupation at the bank due to her mental health issues. Chase paid her STD benefits for the full period allowed for by the STD plan. Chase then terminated Ms. Martinez's employment, effective February 9, 2016, because it still felt as of that time that she was incapable of performing her job duties. It would know since it witnessed her functional abilities each day leading up to her disability at work.

154. Despite Prudential's knowledge that Ms. Martinez was found to be disabled by her employer, Chase Bank, and was therefore receiving disability benefits for depression and anxiety, it made no attempt whatsoever to explain why its denial decision differed. Courts have repeatedly ruled that a claim administrator must acknowledge and address contrary disability claim decisions reached by other entities. *See generally*, *Montour*, *supra*, 588 F.3d 623. "While ERISA plan administrators are not bound by the SSA's determination, complete disregard for a contrary conclusion without so much as an explanation raises questions about

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whether an adverse benefits determination was the product of a principled and deliberative reasoning process." *Id*. at 635 (internal quotations omitted). Indeed, the Ninth Circuit warned that "not distinguishing the SSA's contrary conclusion may indicate a failure to consider relevant evidence." The administrative record contains information regarding the determination by Chase Bank that Ms. Martinez was disabled, however, Prudential failed to acknowledge, consider and distinguish the finding in any of its denial letters. Ultimately, Prudential's failure to address Ms. Martinez's STD benefits award in its denial letters, despite clear knowledge of her award, suggests that it did not fully consider all the evidence supporting Ms. Martinez's disability. The award and later termination strongly evidences that she was and is disabled, contrary to what Prudential has contended, because the standard to receive STD benefits is similar to Prudential's "regular occupation policy." Because Prudential persisted in its position that Ms. Martinez is not disabled without explaining the employer's contrary decision, even after Plaintiff's counsel brought this to Prudential's attention during the appeal process, it raises questions about whether Prudential decided Ms. Martinez's claim fairly and correctly. *See Montour*, *supra*, 588 F.3d at 635.

155. Chase Bank reached its decision to award benefits based in part on the findings of a clinical psychologist it retained to review Ms. Martinez's mental disability claim, Dr. Mosbach. Dr. Mosbach concluded that Ms. Martinez was disabled from performing her own occupation from a mental health standpoint from September 10, 2014 onwards due to anxiety, panic attacks and depression that interfered with her ability to focus, "maintain[] pace at work," and concentrate on and complete her work tasks as Chase's Business Relationship Manager. Since Dr. Mosbach was retained by Chase Bank (the employer and entity responsible to pay Ms. Martinez's STD claim), he obviously had every incentive to find that Ms. Martinez could work and was not mentally disabled from performing her

occupational duties. But Dr. Mosbach concluded she was mentally disabled from working, which is strong evidence that Prudential's claim denial was in error. Again, Prudential made no attempt to distinguish Dr. Mosbach's findings.

156. Similarly, the SSA approved Ms. Martinez's claim for SSDI benefits. The SSA's retroactive award of disability benefits establishes yet another independent entity considers Ms. Martinez disabled from September 10, 2014 through the present, further undermining Prudential's benefit decision.

157. Based upon the independent psychiatric and medical reports of Drs. Nadella and Sedgh, the SSA awarded Ms. Martinez SSDI benefits and "found that [Ms. Martinez] became disabled under our rules on September 10, 2014." Given that the SSA's rules for deciding whether a person is disabled are far more stringent than those in Prudential's group insurance Policy issued to Chase, which Policy requires only that Ms. Martinez be "unable to perform the material and substantial duties of *[her] regular occupation*," this is strong evidence that Prudential made the wrong benefits decision by denying Ms. Martinez's disability claim. *See Rowell v. Aviza Tech. Health & Welfare Plan*, No. C 10-5656 PSG, 2012 WL 1672497, at *17 (N.D. Cal. May 14, 2012) ("Here, Defendants fail to address how Rowell's ongoing eligibility for [Social Security disability] benefits under the stringent, 'substantial gainful activity' standard of the Social Security Act does not support a finding of disability under the substantially less stringent 'your occupation' standard for LTD benefits under the Plan."); *Shaw v. Life Ins. Co. of N. Am.*, 144 F. Supp. 3d 1114, 1135 (C.D. Cal. 2015) ("The Ninth Circuit has warned that 'in some cases, such as this one, the SSA deploys a more stringent standard for determining disability than does the governing ERISA plan.' Specifically, to receive Social Security disability benefits, Shaw had to show that she was 'unab[le] to engage in any substantial gainful activity . . .' Under the Plan, however, Shaw had merely to show that she

was unable to perform the material duties of her regular occupation." (citations omitted)); 423 U.S.C. § 423(d)(1)(A) (standard for SSDI disability benefits) ("The term "disability" means -- (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months[.]"); 423 U.S.C. § 423(d)(2)(A) ("An individual shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy . . .").

158. An independent government entity, the SSA, has concluded that Ms. Martinez is currently disabled from performing *any type* of gainful work *including her own* and has been since September 10, 2014, which is strong evidence that Ms. Martinez cannot perform the material duties of her own regular occupation, contrary to what Prudential contends. *See Rouleau v. Liberty Life Assurance Co. of Boston*, 2017 WL 359466, at *7 (W.D. Mich. Jan. 25, 2017) ("In its de novo review, the Court weighs the SSA determination heavily.").

159. In an attempt to comply with *Montour*, *supra*, 588 F.3d at 635 (only because Plaintiff's counsel discussed this in the second appeal), Prudential briefly explained in its final denial why its benefits decision differed from that of the SSA. Prudential's explanation lacked any detail, meaningful analysis or logic. It summarily dismissed the SSA's finding of mental disability based on the terse, unsupported, conclusory opinion of Prudential's own biased psychiatrist consultant, Dr. Chavez, that "the restrictions and limitations documented by the [SSA's] independent medical examiner [Dr. Nadella] are not medically necessary." In other

words, Prudential concluded with little analysis that Dr. Chavez's opinion (which already contradicted the opinion of Prudential's other psychiatrist consultant, Dr. Hayes) is better than Dr. Nadella's opinion and so the SSA's finding of disability was erroneous.

160. Prudential's superficial attempt to distinguish the SSA's finding is unpersuasive. Dr. Chavez's opinion is not credible, and certainly less credible than Dr. Nadella's, for all the reasons already discussed above, including because Dr. Chavez performed only a cursory paper review of Ms. Martinez's medical records, unlike Dr. Nadella who conducted an in-person exam including numerous objective psychological tests. Second, Dr. Nadella's opinion carries more weight because she is an independent psychiatrist with allegiance to the SSA, not to Ms. Martinez or Prudential. Unlike Dr. Chavez, she has no inherent bias toward any of the parties to this litigation. Third, Dr. Chavez disagreed with Dr. Nadella's work restrictions based on the incorrect assumption that Dr. Nadella did not find "evidence of a major depressive disorder." To the contrary, after an in-person psychiatric mental status exam, evaluation, observation and objective tests, Dr. Nadella diagnosed Ms. Martinez with "major depression," panic disorder," "adjustment disorder with anxiety and depression," and a GAF score of 50 (indicating Ms. Martinez is clinically depressed to the point she has "serious impairment in . . . occupational . . . functioning [and is] unable to keep a job.")

161. Further, the cursory explanation Prudential and Dr. Chavez offered to reject the SSA and Dr. Nadella's disability finding is based on reasons that violate the Plan's terms. They required Ms. Martinez to meet a heightened standard for "disability" not required by the Plan and rejected Dr. Nadella's opinion for the same reason. They reasoned Ms. Martinez could not be mentally disabled from performing her job duties because Dr. Nadella failed to find evidence of "self-

harm," confinement to a mental hospital, "severe mental illness," or "psychosis." As alleged above, that flawed logic is not permissible under the Plan documents, and it is nonsensical. A person need not be confined to a mental hospital, for example, before their debilitating depression, anxiety or panic attacks can interfere with their ability to properly perform their job duties. That is not the Plan's standard for disability.

162. Prudential's benefits decision is flawed for yet another reason. Prudential's own board-certified orthopedic surgeon consultant for both appeal reviews, Dr. Trotter, concluded that Ms. Martinez had medical restrictions and limitations that would prevent her from working. He concluded that due to the cartilage damage in her right knee, which would (and did) require surgery, she could not walk/stand for more than forty-five minutes at a time or for more than two hours total in an eight-hour workday, from February 3, 2015 through the present. While Prudential does not dispute Dr. Trotter's findings, it contends they are irrelevant because of its other findings that Ms. Martinez had no mental restrictions and limitations from September 2014 through February 2015 (based on Dr. Chavez's findings during its appeal reviews) and was not "actively employed" with Chase Bank at that time (and thus lost coverage under the Policy's terms by the time her admitted knee/physical disability commenced). But, as already established above, Ms. Martinez was mentally disabled from September 2014 through the present. She thus did not lose coverage under the Policy and, therefore, Dr. Trotter's findings provide additional evidence that Ms. Martinez was disabled from performing the material duties of her regular occupation. Her occupation required her to walk/stand for long periods of time, usually about 85% of her workday, *i.e.* 6.8 hours of an eight-hour workday.[19] Prudential's own peer review physician concluded Ms.

[19] Ms. Martinez consistently worked 40-60 hours per week which would require even more walking/standing than 6.8 hours per day.

Martinez could not do that, that she could walk/stand at most two hours total in an eight-hour work day. Thus, Dr. Trotter's findings alone conclusively prove Ms. Martinez could not perform the material duties of her regular occupation as a Business Relationship Manager of a large bank from February 2015 onwards.

163. The opinions of Prudential's *own* medical consultants conclusively establish that Ms. Martinez was continuously disabled during the entire Elimination Period, September 10, 2014 through March 11, 2015 and beyond, and thus entitled to disability benefits. The first psychiatrist consultant Prudential employed to investigate the claim in early 2015, Dr. Hayes, concluded that Ms. Martinez was disabled for psychiatric reasons from September 10, 2014 through March 2, 2015. And, Dr. Trotter concluded, as just noted, that Ms. Martinez was disabled due to knee and orthopedic problems from February 3, 2015 onward, at least through November 2016. While Prudential hired an additional psychiatrist expert months later (Dr. Chavez) and "cherry-picked" his opinion over Dr. Hayes's to support its disingenuous benefits decision, it cannot escape the fact that its own medical consultants, Drs. Hayes and Trotter, unequivocally establish that Ms. Martinez was disabled for the entire Elimination Period and beyond and, thus, entitled to benefits. That alone is enough to meet Ms. Martinez's burden to prove on a de novo review that it is more probable than not that she was disabled during the Elimination Period and thereafter.

164. Over the nearly two-year period that it investigated this matter, Prudential's position shifted like the wind whenever it was confronted with new facts that did not support its pre-contrived decision to deny Ms. Martinez's claim irrespective of its merits. The glaring problem for Prudential is, along the way, its own experts reached opinions that it now must live with, and those opinions collectively establish disability for the entire 182-day Elimination Period and

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beyond, first a mental disability and then an orthopedic one.

165. Prudential's benefits decision is further woefully deficient because it failed to evaluate Ms. Martinez's occupational duties. Under the Policy, Ms. Martinez is considered "disabled" (and thus entitled to benefits) if she is unable to perform the material and substantial duties of her regular occupation. An insured's occupational duties are thus critical to an insurer's disability analysis. But Prudential did not even know Ms. Martinez's job duties the first two times it denied her claim. As of that time, nowhere in Prudential's claim file as it then existed were Ms. Martinez's job duties or the duties of a Business Relationship Manager for a large, national bank documented, analyzed or considered. Prudential did not obtain a job description from Ms. Martinez, her employer Chase Bank or anyone else. It did not use a vocational consultant to determine her job duties (or at all). Consequently, it did not discuss Ms. Martinez's job duties or the duties of her regular occupation in its first two denial letters.[20] These facts alone are fatal to Prudential's position. It was not feasible for Prudential to reasonably conclude that Ms. Martinez is "not disabled" from performing the duties of her regular occupation because it did not even know what those occupational duties included when it denied her claim or first appeal.

166. The proper standard of review is de novo. Any grant of discretionary authority contained in the Plan is void in light of California Insurance Code section 10110.6, which provides, in relevant part:

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[20] Prudential devoted just one sentence to Ms. Martinez's job duties in its final, November 2016 denial of her second appeal prepared by her lawyers, only because her lawyers forced Prudential to confront the obvious flaw in its logic. Plaintiff's lawyers sent Prudential Chase Bank's detailed job description for her position and demanded that it consider her occupational duties. In response, Prudential did not discuss any of the cognitive aspects of her job, only the physical, making its purported one-sentence occupational "analysis" superficial and flawed.

> (a) If a policy, contract, certificate, or agreement offered, issued, delivered, or renewed, whether or not in California, that provides or funds life insurance or disability insurance coverage for any California resident contains a provision that reserves discretionary authority to the insurer, or an agent of the insurer, to determine eligibility for benefits or coverage, to interpret the terms of the policy, contract, certificate, or agreement, or to provide standards of interpretation or review that are inconsistent with the laws of this state, that provision is void and unenforceable.
>
> (b) For purposes of this section, "renewed" means continued in force on or after the policy's anniversary date.
>
> (c) For purposes of this section, the term "discretionary authority" means a policy provision that has the effect of conferring discretion on an insurer or other claim administrator to determine entitlement to benefits or interpret policy language that, in turn, could lead to a deferential standard of review by any reviewing court.
>
> ...
>
> (g) This section is self-executing. If a life insurance or disability insurance policy, contract, certificate, or agreement contains a provision rendered void and unenforceable by this section, the parties to the policy, contract, certificate, or agreement and the courts shall treat that provision as void and unenforceable.

167. This section, by its own terms, applies to any Policy, certificate, contract or agreement that provides "disability insurance coverage" to "any California resident" regardless of where it was offered, issued, delivered, or renewed. Here, no party disputes that Plaintiff is a California resident. As such, this section applies to the group policy, certificate and Plan at issue so long as they were offered, issued, delivered, or renewed after the effective date of the statute, which is January 1, 2012, but before Plaintiff's claim accrued. *See Gonda v. The Permanente Med. Grp., Inc.*, 2014 WL 186354, at *2 (N.D. Cal. Jan. 16, 2014). No party disputes that Plaintiff's claim accrued on April 10, 2015, which is the date on which her claim was first denied. *See Grosz–Salomon v. Paul Revere Life Ins.*, 237 F.3d 1154 (9th Cir. 2001) (holding that an ERISA cause of action based on a denial of ERISA benefits accrues at the time benefits are denied).

168. Thus, the only issue is whether the Policy was offered, issued, delivered, or renewed on or after January 1, 2012, but before April 10, 2015. For

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the purposes of section 10110.6, a policy automatically renews every year on the policy's anniversary date. *See* Cal. Ins. Code § 10110.6(b) (providing that "renewed" means "continued in force on or after the policy's anniversary date"). Plaintiff alleges on information and belief that the group Policy became effective on or before January 1, 2011 and that the Policy anniversary is annually on January 1. Indeed, the group certificate of insurance in the administrative record that is part of the Plan and group Policy has a January 1, 2011 effective date. The Policy, Plan and certificate has renewed, on information and belief, each year on January 1, 2012, January 1, 2013, January 1, 2014, January 1, 2015 and continuing. This means that the policy's renewal date falls within the relevant time period, as the policy continued in force through January 1, 2012. *See Gonda, supra* at 1093-94; *Polnicky v. Liberty Life Assur. Co. Of Boston*, 999 F. Supp. 2d 1144, 1148 (N.D. Cal. 2013) (applying de novo standard of review to ERISA claim for denial of benefits because "[t]he Policy was continued in force after its January 1, 2012 anniversary date, [so] any provision in the Policy attempting to confer discretionary authority to Liberty Life was rendered void and unenforceable"). As such, any grants of discretion that can be deemed to be a part of the policy or Plan are void and unenforceable, and thus, the denial of benefits at issue must be reviewed de novo.

169. In a de novo review, "the burden of proof is placed on the claimant" to establish entitlement to plan benefits. *Muniz v. Amec Const. Mgmt., Inc.*, 623 F.3d 1290, 1294 (9th Cir. 2010). "When conducting a de novo review of the record, the court does not give deference to the claim administrator's decision, but rather determines in the first instance if the claimant has adequately established that he or she [qualified for benefits] under the terms of the plan." *Id.* at 1295-96. The trial court performs an "independent and thorough inspection" of the plan administrator's decision in order to determine if the plan administrator correctly or incorrectly

denied benefits. *Silver v. Executive Car Leasing Long–Term Disability Plan*, 466 F.3d 727, 733 (9th Cir. 2006). De novo review permits the trial court to "evaluate the persuasiveness of conflicting testimony and decide which is more likely true." *Kearney v. Standard Ins. Co.*, 175 F.3d 1084, 1095 (9th Cir.1999).

170. Regardless of the standard of review this Court applies, Prudential reached an incorrect decision given the overwhelming medical records and other evidence presented during the claim establishing Plaintiff was and is disabled within the meaning of the Plan. Prudential's denial letters collectively failed to credit the overwhelming medical evidence supporting Plaintiff's on-going claim for LTD benefits; improperly relied on poorly reasoned "paper reviews" of biased psychiatrists (whose opinions even directly contradicted each other) over the more credible opinions of Ms. Martinez's attending physicians; improperly required Ms. Martinez to meet a heightened standard for disability not contained in the Plan such as "hospitalization" for a mental illness; and failed to determine Ms. Martinez's occupational duties. Additionally, Prudential failed to meaningfully distinguish the decisions by multiple independent entities with adverse interests to Ms. Martinez, such as her employer and the SSA, that found her disabled and entitled to disability benefits (based on in-person exams by independent physicians having no affiliation to her). Accordingly, Prudential conducted a biased claims investigation consistent with its conflict of interest that failed to provide Plaintiff with a full and fair review of her claim, which is a violation of ERISA, and led to an incorrect benefits decision.

171. Plaintiff exhausted her administrative remedies under the Plan and has the right to bring a legal action for benefits under ERISA section 502(a). Prudential's November 14, 2016 denial letter stated as much, specifically, "you may file a lawsuit under the Employee Retirement Income Security Act (ERISA)."

172. Plaintiff is now and at all relevant times remained "disabled" as defined in the Plan, and has now and at all relevant times convincingly demonstrated her total disability through medical records and other documents, information and correspondence.

FIRST CAUSE OF ACTION

To Recover Benefits, Attorneys' Fees, Pre-Judgment and Post-Judgment Interest under ERISA Plan – 29 U.S.C. sections 1132(a)(1)(B), (g)(1)

(Plaintiff against Prudential and Does 1 through 10)

173. Plaintiff incorporates the previous paragraphs as though fully set forth herein.

174. ERISA section 502(a)(1)(B), 29 U.S.C. section 1132(a)(1)(B), permits a plan participant to bring a civil action to recover benefits due to her under the terms of a plan, to enforce her rights under the terms of a plan, and/or to clarify her rights to future benefits under the terms of a plan.

175. At all relevant times, Plaintiff has been entitled to LTD benefits under the Plan. By denying Plaintiff's claim for LTD benefits under the Plan, and by related acts and omissions, Prudential violated, and continues to violate, the terms of the Plan and Plaintiff's rights thereunder.

176. Prudential has failed to follow even the most rudimentary claims processing requirements of ERISA and the Department of Labor Regulations and has failed to conduct a "full and fair review" of the claim denial, as required by 29 U.S.C. section 1133(2). Thus, even if the Plan vests discretion in Prudential to make benefit determinations, no deference is warranted with regard to Prudential's

handling of this claim. *See Booton v. Lockheed Medical Benefit Plan*, 110 F.3d 1461, 1465 (9th Cir. 1997); *Jebian v. Hewlett-Packard Company Employee Benefits Organization Income Protection Plan*, 349 F.3d 1098, 1105 (9th Cir. 2003) ("When decisions are not in compliance with regulatory and plan procedures, deference may not be warranted.").

177. A "prudent person" standard is imposed on ERISA fiduciaries. *See* 29 U.S.C. §1104(a)(1)(b). A "fiduciary" is also under a duty of loyalty and care to the beneficiaries of the Plan. *See* 29 U.S.C. section 1104(a)(1). Under ERISA: (1) a fiduciary must discharge its duties solely in the interest of plan participants and beneficiaries and for the exclusive purpose of providing plan benefits to them; (2) a fiduciary must act with care, skill, prudence and diligence; and (3) a fiduciary may not act in any capacity involving the Plan, on behalf of a party whose interests are adverse to the interests of the Plan, its participants, or its beneficiaries. Prudential's handling of Plaintiff's disability benefit claim falls far short of these standards.

178. For all the reasons set forth above, the decision to deny disability insurance benefits was arbitrary, capricious, wrongful, incorrect, unreasonable, irrational, contrary to the evidence, contrary to the terms of the Plan and contrary to law. Prudential abused its discretion in deciding to deny this claim as the evidence shows its denial decision was not only incorrect but, arbitrary and capricious. Further, Prudential's denial decision and actions heighten the level of skepticism with which a court views a conflicted administrator's decision under *Abatie v. Alta Health & Life Insurance Co.*, 458 F.3d 955 (9th Cir. 2006) and *Metropolitan Life Insurance Co. v. Glenn*, 544 U.S. 105 (2008). Prudential's denial of Plaintiff's claim constitutes an abuse of discretion.

179. Alternatively, Plaintiff has met the burden under a de novo standard of

review establishing she is disabled due to her symptoms alleged above, including without limit severe depression, anxiety, panic attacks, difficulty concentrating, difficulty focusing, right knee and foot pain, shoulder pain and low back pain, most of which have plagued her from September 2014 to present and continuing. Prudential's denial of Plaintiff's claim was incorrect and improper based upon all the evidence discussed herein.

180. As a direct and proximate result of Prudential's denial of disability benefits, Plaintiff has been deprived of LTD benefits from and after March 2015.

181. As a direct and proximate result of the denial of her claim for LTD benefits, Plaintiff has been required to incur attorneys' fees to pursue this action, and is entitled to reimbursement of these fees pursuant to 29 U.S.C. section 1132(g)(1).

182. A controversy now exists between the parties as to whether Plaintiff is disabled as defined in the Plan and therefore entitled to LTD benefits. Plaintiff seeks the declaration of this Court that she meets the Plan definition of disability, and is entitled to benefits under the Plan. In the alternative, Plaintiff seeks a remand to the claims administrator for a determination of Plaintiff's claim consistent with the terms of the Plan.

183. Plaintiff alleges all the same conduct against Does 1 through 10 as she does against Prudential in this First Cause of Action and in this Complaint.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court grant the following relief against all Defendants:

1. For all Plan benefits due and owing Plaintiff, including LTD benefits;
2. For costs and reasonable attorneys' fees pursuant to 29 U.S.C. section 1132(g);
3. For pre-judgment and post-judgment interest on the principal sum, accruing from the date the obligations were incurred. *See Blankenship v. Liberty Life Assurance Co. of Boston*, 486 F.3d 620, 627 (9th Cir. 2007) ("A district court may award prejudgment interest on an award of ERISA benefits at its discretion."); *Drennan v. General Motors Corp.*, 977 F.2d 246, 253 (6th Cir. 1992). Specifically, Plaintiff seeks interest at the rate of 10% per annum, pursuant to California Insurance Code section 10111.2; and
4. For such other and further relief as this Court deems just and proper.

Dated: April 14, 2017

MCKENNON LAW GROUP PC

By: [signature]
ROBERT J. McKENNON
JOSEPH S. McMILLEN
Attorneys for Plaintiff Dora Martinez